

THE IMPACT OF CONSTITUTIONS ON DEMOCRATIZATION: CASES OF HUNGARY AND BULGARIA

A Master's Thesis

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ABSTRACT

The Impact of Constitutions on Democratization: Cases of Hungary and Bulgaria

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This study seeks to analyze the correlation between constitutions and democratization by comparing the cases of Hungary and Bulgaria. It suggests that the democratic credentials of constitutions are dependent to the constitution-making factors and processes, constitutional design as well as the implementation process.

Both countries under study have adopted new constitutions to cope with the process of democratization. The new constitutions became a crucial asset to democratization to the extent they were indispensable in structuring the new governments and spelling out a catalogue of basic rights. They imparted the political systems with the fundamental characteristics of the democratic regimes, but lack of respect for the rule of law among the governing elites puts into question the whole project of democratization.

Thus, constitutions can induce institutional incentives that smooth the process of democratization, but they by themselves can not produce a workable democracy. Democratization is a multifaceted project, which extends beyond the constitutional impact. Respect for the rule of law seems to be the missing chain and the future challenge of democratization.

Keywords: Constitution, Democratization, Eastern Europe, Bulgaria, Hungary

ÖZET

Anayasaların Demokratikleşme Üzerindeki Etkileri: Macaristan ve Bulgaristan Durumları

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Bu çalışma anayasalar ve demokratikleşme arasındaki ilişkiyi, Macaristan ve Bulgaristan durumlarını karşılaştırarak, analiz etmeyi amaçlamaktadır. Tezin temel argumanı şudur ki anayasaların demokratik özellikleri, onların uygulanma süreçlerine olduğu kadar, anayasa yapma sürecine, anayasa yapmayı etkileyen faktörlere ve anayasanın içeriğine bağlıdır.

Karşılaştırılan iki ülke, demokratikleşme sürecine yeni anayasalar kabul ederek başladılar. Bu anayasalar, yeni hükümetlerin yapısını düzelttikleri ve temel hakları belirledikleri ölçüde demokratikleşme sürecinin önemli unsurları olmuştur. Bundan dolayı, anayasalar bu ülkelerin politik sistemlerine, demokratik rejimin temel özelliklerini kazandırdılar. Fakat, yönetici seçkinlerin, hukukun üstünlüğü ilkesini benimsememesi demokratikleşme projesinin gerçekleşmesine engel oluyor.

Böylece, anayasalar her ne kadar demokratikleşme sürecini kolaylaştıran kurumsal düzenlemeleri yapsalar da, kendi başına iyi işleyen bir demokrasi kuramazlar. Demokratikleşme anayasayı aşan çok yönlü bir projedir. Hukukun üstünlüğü ilkesinin yerleşmesi ve yönetici seçkinler tarafından benimsenmesi Doğu Avrupadaki ülkelerdeki demokratikleşme sürecini mümkün kılacak en önemli etkidir.

Anahtar Kelimeler: Anayasa, Demokratikleşme, Doğu Avrupa, Bulgaristan, Macaristan

TABLE OF CONTENTS

ABSTRACT.....	i
OZET.....	ii
TABLE OF CONTENTS.....	iii
INTRODUCTION.....	1
CHAPTER I: CONSTITUTIONALISM –A NECESSARY SHIELD FOR DEMOCRACY	
1.1 Introduction.....	4
1.2 Untangling the Concepts	
1.2.1 Democracy.....	5
1.2.2 Constitutionalism.....	7
1.2.3 Constitution.....	9
1.2.4 Transition.....	12
1.3 Constitutional Democracy	
-Preventing Human Beings to Make a Mess of Things	
1.3.1 Constitution and Democracy are Mutually Supportive.....	14
1.3.2 Subordinating Politics to the Rule of Law	16
1.3.3 Attributes of Constitutional Democracy.....	19
1.4 Democracy is Too Important to be Left to Chance	
1.4.1 Big Bang.....	20
1.4.1.1 Simultaneous Economic, Political and Social transformations.....	21
1.4.1.2 Institutional Vacuum, which Allows for Abuses.....	23
1.4.1.3 The Logic of Transition	25

1.4.2 The Constitutional Moment.....	26
1.5 Conclusions.....	28
CHAPTER II: THE IMPACT OF CONSTITUTION MAKING ON DEMOCRATIZATION	
2.1 introduction.....	30
2.2 The Political Choice of Designing Constitutions.....	33
2.3 Constitution – making : Factors and Processes.....	37
2.3.1 The Factors Shaping Constitution-making.....	38
2.3.2 Aspects of Constitution-making Relevant for Democratization.....	42
2. 3.2.1 The Timing of Constitution-making.....	43
2.3.2.2 Constitutional Framers.....	45
2.3.2.3 Ratification of Constitution.....	47
2.4 Bulgaria: A Controlled and Quick-fixed Constitutional Agreement.....	48
2.4.1 Controlled Transition.....	49
2.4.2 RTT and Continuity.....	51
2.4.3 Constitution-Making and its Impact on the New Polity.....	52
2.5 Hungary: A Negotiated and Evolutionary Constitutional Arrangement.....	56
2.5.1 The Resurgence of Opposition.....	58
2.5.2 RTT and the September Pact.....	59
2.5.3 Dubious Legitimacy and a Prolonged Interim Solution.....	61
2.6 Conclusions.....	62

CHAPTER III: THE IMPACT OF CONSTITUTIONS EFFECTIVENESS ON DEMOCRATIZATION

3.1 Introduction	65
3.2 The Impact of Constitutions in Terms of Effectiveness.....	66
3.2.1 Effectiveness as a Variable Legitimizing the New Democratic Systems..	66
3.2.2 Two Levels of Evaluating Constitutional Effectiveness.....	67
3.3 Defining Effectiveness.....	72
3.4 Analysis of the Constitutional Design.....	73
3.4.1 The Scope of Human Rights and the Mechanisms Set to Protect Them ..	74
3.4.2 The Regulation of Relations Between State Agencies.	77
3.4.2.1 Strong Parliamentarism in Hungary	79
3.4.2.2 Separation of Powers in the Bulgarian Constitution.....	82
3.5 The Gap Between Constitutional Premises and Reality in the Process of Implementation	85
3.5.1 Trust in Parliaments and Courts	86
3.5.2 Governing Without the Rule of Law.....	88
3.6 Conclusions.....	90
3.7 Tables.....	91
CONCLUSIONS	94
BIBLIOGRAPHY.....	99

INTRODUCTION

Following the renewed interest in the formal aspects of political science, such as rules, procedures and institutions, the impact of constitutional incentives on the life of the polity has become a fundamental political question. Simultaneously, the worldwide movement toward democratization has inspired a large literature on regime transition and consolidation. These two trends have cross-fertilized, producing a research program on the democratization attributes of constitutions. This study intends to contribute to its main question: how and to what extent constitutions impact democratization?

The new constitutions adopted in post-communist Europe are a good laboratory for studying the impact of constitutions in the democratization process. The new constitutions and political transformations occurred in the course of only few years, which means that the constitutional input and regime transformations can be observed and evaluated directly. This research is an effort to make use of the post-communist experience to explain to what degree certain constitution-making processes and constitutional choices assist the democratization process. To what extent the new constitutions can explain the different records of democratization in different countries of the region?

This study compares the cases of Bulgaria and Hungary, which have both replaced their old constitutions with new ones at the very beginning of their transitions. In addition to certain similarities within the two constitutions' design, these two countries also display a set of differences with regard to the constitution-making factors and processes and especially the implementation of their constitutional devices. The aim

of this study is to compare the impact of these variables in order to test my hypothesis that the democratic attributes of constitutions are contingent to the constitution-making factors and processes, constitutional design and its implementation.

The first chapter is aimed to articulate the theoretical argument that constitutional restraints enable democracy. Constitutions impose procedural hurdles for the current majority, as well as on the passionate behavior of the demos; they create mechanisms to insure that people's representatives can not easily betray their electorates; and they provide the fundamental rules of the polity that enable democracy to function effectively. Constitutional constraints gain even more significance in the conditions of a volatile environment with unique chances for abuses, which characterize the process of transition to democracy. My findings suggest that constitutional democracy is the surest path to democracy.

However, the assumed relationship between constitutions and democratization is not straightforward. The second chapter focuses on constitution-making as an intermediate variable, which may foster or inhibit democratization. Both our case studies provide evidence that the extrication mode and the Round Table agreements were important factors to determine the democratic credentials of the new constitutions. With regard to the aspects of the constitution-making process, however, Eastern Europe supplies little evidence to conclude with an optimal constitution-making process. A dubious process in Hungary did not mean that democracy fared better in Bulgaria than in Hungary.

The third chapter intends to consolidate the argument that the correlation between constitutions and democracy is complex, by introducing another intermediate variable, which seems to effect democratization: constitutions' effectiveness. I study

effectiveness on two levels. First, the design of the constitutional texts, and second, the implementation of the constitutional devices in practice. In addition to the text of the constitutions, I make use of the survey data collected from the New European Barometer during 2001. My findings suggest that, although there are some minor problems with the constitutional provisions, they have both imparted their regimes with the fundamental characteristics of democratic regimes. The lack of the rule of law in the governing process, on the other hand, illustrates the gap existing between constitutional principles and their implementation in reality. Thus, constitutional provisions can hardly be attributed a definitive role in engineering democratic systems.

CHAPTER I:

CONSTITUTIONALISM –A NECESSARY SHIELD FOR DEMOCRACY

1.1 Introduction

The post-communist transition has often been seen as an evil advocate's summary because of its unprecedented magnitude of transformation, communist legacies and a pervasive weakness of law, which can be defined at best as a rule by law, and at worst as a degradation of state into clientelist relations. In the midst of a troublesome situation, it is very important to raise the question of the fate of democracy, which is the underlying motive of transition. Can democracy flourish in the very challenging environment of transformation? How can democracy enter into a certain path of development and avoid being subject to the uncertainty of the transition?

My normative assumption through the chapter is that the instauration and eventual consolidation of political democracy constitutes a desirable goal per se. The question is not why, but how can democracy win its victory?

My hypothetical answer is that constitutionalism provides a secure shield for democracy to get in, especially during the troubled times of transition. Constitutionalism provides well-defined limits to the potential abusers of democracy.

The efforts to understand transition have usually stressed the peculiarities of the region, and have called for an analysis at the crossroads of law and society, culture and history, economics and politics, employing a multi-disciplinary and case specific methodology to the study of the subject. The analysis vacillates between three levels of analysis –post-communist legacies, institutions that emerged in the scene and the

strategic decisions of the main actors. My methodology to study the prospects of democracy, in the context of transition, is less ambitious than a country-specific and multi-layered analysis. I approach the problem analyzing the interaction among three variables: democracy, constitutionalism and transition.

The first part is an effort to provide an overview of the concepts, untangle and establish definitions of each. I adopt a process oriented analytical approach to the concepts. The first step to enter to the heart of the matter, is analyzing the relation between constitutionalism and democracy. This part aims to show that both theories complete each other. In the third part, while introducing the complexity of the transition process, I argue that constitutional restraints are important to put order to the all-fluctuating environment, which creates unique chances for abuses.

My findings do insert tones of hopes to the gloomy picture of the future of democratization in transition. I argue that constitutional democracy is the surest path to democracy because it guarantees its protection from both the ability of man to make a mess of things and the risk of a total big bang to drag democracy into its black hole.

1.2 Untangling the Concepts

1.2.1 Democratization

Defining democratization is a thorny task, mainly, but not only because democratic theory and polity are undergoing a process of restructuring, which has put

into question the very certain lines of liberal democratic orthodoxy¹ (Saward, 2001: 560). However, escaping the debate on today's democratic innovations and future sketches, I try to adopt a broad definition of democratization, which stands over the disputable arguments, but is still essential and operative² (O'Donnell and Schmitter, 1986: 10). This definition must demarcate the substantive core of democratization, being basic democratic principles, and the operationalization of those principles, being “devices that enact principles” (Saward, 2001: 577). As such, it embodies some minimum standards, while conceiving of an open-ended process of democratization.

Democratic theory is based on the presumption of human dignity educed from the very nature of human being. Being worth of respect, man is worth of autonomy and self-realization, which in the context of politics stands for sharing the governance of its political community. The modern politics has alternated people's right of self-government to a more feasible form of delegating their right of self-government to their freely elected representatives. Thus, the basic democratic premise has been translated to a set of democratic principles: political equality, inclusion, common interest and participation (Saward, 2001: 577).

The formal procedures to operationalise democracy³ (see Saward, 2001, Nino, 1993) range between a wide variety of institutional choices, depending from a complex set of indigenous factors. However, there is almost consensus on a formal procedural minimum, which need obtain: secret balloting, universal adult suffrage, regular

¹ Saward describes the undisputable elements of a traditional approach to democracy as a) representative institutions, b) formal structures of the state, c) territorial units, d) majority rule, e) constitutional constraints f) formal and hierarchical accountability of elected officials.

² While democracy itself is a matter of principles, democratization is seen as a process of putting these principles into practice through specific and detailed rules and procedures.

³ Saward argues that procedures are necessary to enact substantive democratic principles. Nino offers a similiar argument maintaining that democratic process of decision making is more reliable than informal subjective discussion to reach solutions to inter-subjective issues.

elections, partisan competition, associational recognition and access, and executive accountability. Together with a plethora of rights those procedures create an open market of political ideas that allow people to choose the candidates they find appropriate.

O'Donnell and Schmitter incorporates these principles and procedures in the concept of citizenship, which is "both the right to be treated by fellow human beings as equal with respect to the making of collective choices and the obligation of those implementing such choices to be equally accountable and accessible to all members of the polity" (O' Donnell and Schmitter, 1986: 10). However, democratically designed mechanisms provide only opportunities for the pursuit of democratization. People must earn their liberty by the quality of their decisions.

1.2.2 Constitutionalism

The democratic norm "one person one vote", inevitably, generates a simple majority rule, which makes decision-making vulnerable to majority's decisions. In the words of Tocqueville, the democratic era is an age of quantity, after that of quality. Although it is only a decision-making arrangement, 'unwise' majorities can forget about the rest, hence harming the very essence of democracy that people not majority is the sovereign.

Constitutionalism stands for limits on majority's decisions, that are in some sense self-imposed, to prevent a possible dictatorship of the majority. Thus,

constitutionalism fights a two front-war: against the executive and the legislative branches of government.

Any government wants to have discretionary and effective powers of action. But, the mere possibility it may use its powers for particularistic purposes, and decide that rights ought not stand in its way, makes it necessary to put restraints on government, even when it claims to act in the name of the common good. Elster sums up the constitutionalism's struggle with day-to-day wielders of power as "rules versus discretion", while constitutionalism's struggle with those that decide future rules of the game as "reason versus passion" (Elster, 1988b: 6). Thus, constitutionalism is assumed to be grounded in reasonable rules, which are fenced off from the discretion and passion of the decision-making majorities.

Schmitt, a critique, but also one of the foremost specialists of liberal constitutionalism, asserts that in line with the liberal philosophy of freedom the individual can only be subject to the rule of reason. Through reason, the individual may come to justify certain limits to its freedom. Man enters into a contract with other fellow man to establish the state, which must regulate and make compatible individuals' freedoms. Individuals have in principle unlimited freedom, whereas state is in principle limited to intervene. Limits to freedom are not subject to state's decision but to reason's determination. Thus, "the guiding principle of the Rechtsstaat is to protect the freedom of the individual against the power of the state" (Slagstad, 1988: 104).

On the other hand, the Rechtsstaat is a legal state, where laws guide the governors 'ruling' because "Governors rule at the extent they follow the existing positive norms in a competent way" (Slagstad, 1988: 106). In addition to being a legal state, which subordinates the legitimacy of action to the respect for law, Rechtsstaat is a

“doctrine specifying which characteristics rules need to possess in order to be regarded as law” (Slagstad, 1988: 107). Although, Schmitt is highly critical to the binding of state through the general character of the legal norms embedded in constitutionalism, his analysis elicits the substantial core of constitutionalism. But, constitutionalism can be attached better attributes if one extends the focus of the political beyond the distinction friend and foe proposed by Schmitt (1996: 19–79).

While Schmitt provides a rigid definition, conceiving of constitutionalism as a closed and sovereign system of legal norms and prescriptions that reduce the state to nothing but norms or procedures, it seems that constraints to political power through certain normative and procedural limitations, are indispensable to the concept and operationalisation of constitutionalism.

Concerned with human inclination to act selfishly and abuse power (see Hobbes, 1991: 183–201), constitutional theorists advocate institutional restraints on substantive matters, on the grounds that rules of reason prevent decision makers to abuse the authority delegated to them. It presumes that there are standards to judge whether public policies infringe on human dignity and democratic principles. Therefore, the legitimacy of the politics depends on substantive criteria as much as it depends on the authenticity of the decision makers. But, what are the standards employed to judge the legitimacy of politics and how are they embedded in constitutions?

1.2.3 Constitution

In its general meaning, the constitution makes up or patterns a political system, which implies it claims control over all other political acts. Most of the texts labeled

constitutions, implicitly or explicitly, proclaim themselves to be the supreme law of the land.

Constitutions are very different from each other, and are embedded in a case specific socio-political and historical context, which makes it difficult to generalize and come up with one concept of constitution. However, most of the liberal constitutions include a common set of rules. Schmitt prescribes the Western type constitution as a document, which “corresponds to demands for civil freedom and definite guarantees of this freedom” (Slagstad, 1988: 104). The basic features he attaches to constitutions are first, a system of guarantees of freedom from state interference, and second, the difficulty to alter or amend it comparing with other legislation, inducing an element of stability. In the liberal constitutions individual freedoms and guarantees are realized through a) the recognition of basic rights, b) the division and balance of powers and c) a minimum of popular participation in the legislative process. The need for stability is realized through the prescription of complicated procedures to change the constitution, ensuring a degree of permanence (Slagstad, 1988: 104).

Another view enlarges the scope of Schmitt’s definition of constitution by defining its functions as: a) a sketch of the fundamental modes of legitimate government operations, escaping proclamation of any substantial values despite obedience to itself; b) a guardian of fundamental rights incorporating both democratic principles and constitutionalism’s concern to limit the power of representatives; c) a symbol and formative force of people’s active consent to remain a nation for better or worse, through prosperity and poverty, in peace and war, guiding as well as expressing people's hopes for themselves as a nation (Murphy, 1993: 8). The two definitions of constitutions, however, share three common features the liberal constitutions must have:

provisions of fundamental rights, provisions of modes of legitimate government and difficult rules of amendment. And, they both employ a formalist analysis, which relies on the structural features of constitutional documents.

On the assumption that in contemporary societies, the legitimacy of the state rests upon the government's adherence to the rule of law, constitutions are judged from the extent they encompass rational-legal institutions such as judicial review, due process of law and separation of powers. The formalist view presupposes that constitutions provide rules for making rules and state organization, which parallels a predilection of norms and subordinated institution building.

Some other scholars approach constitutions as a dynamic process, rooted in the local social realities. Although, constitutions have a country-specific dimension and it is hard to find even two identical ones, a pure relativist approach leads us nowhere because its antipathy towards values creates a problematic basis to see rule of law and discretion, reason and passion, individual and majority's will, anarchy and institutions, man and state, and consequently, democracy and dictatorship in the same value free and equal terms. The constitution's analysis should incorporate the relativist element only at the extent it pays respect to a set of minimalist procedural and substantial parameters. Thus, it is possible to view constitutions as an open and dynamic process, allowing for case-specific innovations, but it demarcates the apriori requirements for a constitution to pass the exam of democracy.

The substantive criteria would be the extent constitutions embody the democratic principles like individual rights and freedoms, which guarantee that some rights are not subject to decision-making procedures, and allow people to influence, check and replace their decision-makers, if necessary. The necessary procedures would be legal-rational

mechanisms that ensure the functioning of fundamental democratic principles like judicial review, the rule of law, and separation of powers.

1.2.4 Transition

To define transition is as difficult as to comprehend uncertainty. A loose and empty definition would be that it is the interval between the changes of two different political regimes. We may know the starting point of the transition, which is delimited from the launching of the process of dissolution of the existing regime usually put under the label authoritarian, but it is certainly difficult to predict its final destination. Thus, it is a transformation process from a certain regime, whose rules of the game has been put into serious question to an uncertain “something else”. The something else differs from the instauration of a democratic system to a return to authoritarianism or simply a vicious circle of confusion, lacking an enduring solution to political regime. However, transition to democracy implies a peaceful transformation, different from a revolutionary approach to change, which has a more or less articulated end point usually labeled under very general terms of democratization.

The most important defining characteristic of transition is, that the rules of the political game, far from being stable and legitimate, are arduously contested, hence in a continuous flux. It is a quarrel battle where “actors struggle to satisfy their immediate interests, but also to define rules and procedures whose configuration will determine likely winners and losers in the future” (O’ Donnell and Schmitter, 1986: 6). Thus, it is a normative movement because it has a claim to democratization, but it is also a factional game vulnerable to groups and individuals particularistic interests.

In transition, rights and arrangements, which in a stable democracy would be reliably embedded in constitution and protected through impersonal-institutional provisions, are still *de jure* or *de facto* in the hands of former rulers. Therefore, certain individuals' attitudes, preferences, choices and decisions are an important input of the political outcome of the transition. Schmitter attaches a decisive role in determining the outcomes of the political game to the casual inputs like unexpected events, insufficient information, hurried and audacious choices, confusion about motives and interests and plasticity of political identities (O'Donnell and Schmitter, 1986: 5).

The problem is the extent to which this input causes an aberration of political output from the desirable end goal of the transition, articulated at its very beginning, – instauration of democracy. It is properly here that constitutional democratic theory and proper substantial and balanced “rules to make rules”, embedded in formal and authoritative constitutions, introduce an element of controlling the worst enemy, still necessary component of democracy –unpredictability.

Although proper formal substantial limits to the misuse of political power may not, ideally, safeguard democracy, introduce legitimacy or pattern democratic attitudes; they smooth the path towards democracy. Liberal democratic constitutions reduce the uncertainty that the “something else” will be very different from democracy because at the least they remind people that their government is what they ‘deserve’, but not what they aspire for. They show the light at the end of the tunnel, hence the way out of transition and abnormality.

The transition is over when the conflict on the very rules of the political game ceases to be the feature of politics. The parties go out of abnormality when they settle on and obey rules defining legitimate channels to political power, means to exercise

power and the criteria to resolve the conflict with the others. The democracy conquers its victory when a “normal” uncertainty, set up in constitutional rules gets settled. The normal uncertainty is an institutionalized uncertainty. Its essential feature is that “none can be certain that their interests will triumph. All forces must struggle repeatedly for the realization of their interests since no one is protected by the virtue of its position” (Przeworski, 1988: 62). In the same line of argument, Nino maintains that normal uncertainty is the existence of inter-subjective legal rules reached through a deliberative debate in which people participate equally (Nino, 1993).

1.3 Constitutional Democracy

-Preventing Human Beings to Make a Mess of Things

1.3.1 Constitution and Democracy are Mutually Supportive

To understand the relation between democracy and constitutionalism and the effect of their merging we should start from their commonality: they are both based on the notion of human worth and dignity and concerned with mitigating the risks of being a member of political society to these values. Still, they differ significantly from the approach each has to human nature and the means they propose to protect human dignity. Democracy tends to promote participation and protect the right of individual to share the governing of their community. It assumes that people have or can develop the required skills to engage in responsible deliberation and decision-making. Constitutionalism, on the other hand, has a more pessimistic view of selfish and power abusing humans and seeks to defend democratic values through institutional restraints on substantive matters.

Seen independently, both theories carry the danger of destroying the very aim they stand for. The majority rule, representatives or even the pluralist groups associated with democracy, may restrict the ‘others’ rights at the extent it negates their right and quality of participation⁴ (for a discussion on a non-unitary concept of democracy see Sunstein, 1988: 352). It may turn politics into a self-interested representation, factional tyranny and/or permanent revolution. Constitutionalism perils lie in generating governmental inaction, hence imposing governance costs. Caught in between prearranged rules, often descending to previous generations, governments may not be able to implement their programs given the obstacles that constitutional laws pose on their activity. The solution to both democracy and constitutionalism, containing the grains of their own destruction, is their merging together in order to keep an eye to each other’s risks. Historical experience validates the claim that “to enjoy reasonably effective but still limited government, many countries have adopted a mix of constitutionalism and democratic theory” (Murphy, 1993: 6).

The output of their merging, constitutional democracy encompasses the democratic precondition of popular participation and simultaneously limits people’s government by a variety of substantial and institutional means. Constitutional democracy’s goal of securing a realm for public discussion and collective selection of preferences (Sunstein, 1988: 352) serves to continuation of democratic rule. Holmes, one of its prominent defenders, furthers the traditional justification for constitutional

⁴ Many scholars of democracy argue that pathologies of democracy and their solution depend from whether you see democracy in pluralist or republican terms. In a pluralist democracy different groups struggle for sources and make it vulnerable to self-interested and factional tyranny. Republican democracy and its main focus on freedom, hence participation of the active citizens to decide the terms of their political life enhances irregularity and almost a permanent revolution in politics. However, in this paper democracy is seen an independent variable. It is defined as a procedure to establish validity of impersonal preferences.

democracy, as invoking fundamental rights and dis-empowering myopic majorities, by claiming that certain restraints enable democracy (Holmes, 1988: 233).

Moreover, as put in his words, constitutional democracy is the most humane political system because “[It] keeps open the widest gamut of alternatives for new and better decisions. [] Our humanity is best located in our ability not merely to decide but also to undo unsatisfactory past decisions and decide again” (Holmes, 1988: 233). But, how does constitutional democracy work and what are its attributes?

1.3.2 Subordinating Politics to the Rule of Law

Constitutional democracy is a regime, which provides a certain conceptual and institutional web between constitutionalism, democracy and politics. The crucial point of this web is the general norm that law not governors rule. Translated in a more concrete language, constitutions provide a variety of laws, which command and organize people’s government while protecting and promoting people’s rights.

Constitutional democracy’s underlying assumption is that no man or group of man is good enough to rule without the consent of his or her subjects. The constitution is to ensure that no man can have a last word in ruling. Therefore, it introduces impersonal laws that serve as positive criteria to measure legitimacy and embeds procedures that validate their legitimacy. The constitution freezes those criteria by fencing them off from majority because they are too important to be subject to vulnerabilities of majority politics. These attachments add to the simple democratic principle of participation in order to correct the deficiencies of its output – representation. Argentina’s first civilian president, Alfonsín, advocates the necessity of constitutional constraints arguing, “The term democracy conotates more than simply

participatory and representative government. It encompasses a rule of law bound by the central requisites of liberalism –a set of traditional civil and political rights that serve to deter state action” (1993: 41)

Laws embedded in constitutions vary according to the constitutional strategies pursued to reinforce democratic processes. These strategies are usually categorized in two: a) structural provisions and b) rights provisions (Slagstad, 1988). Structural provisions, or in Schmitt’s terms organizational principles, are generally speaking institutional devices, which reinforce democratic processes. One of the typical structural measures consists in the separation of powers and a system of devices to check and balance government’s powers with the intention to enhance popular control to government’s acts. Thus, state is divided into legislative, executive and judicial branches, arranged within a system, which designates areas of competence for each branch. Although insulated from majoritarian politics, to the extent they are embedded in hardly amendable constitutional texts, structural provisions should be seen as democratic insofar as they ensure that government will act in the interest of the public.

Ackerman advocates the controlling and virtue economizing functions of the separation of powers on the grounds that “it gives elected officials the powerful incentives to question the success with which rival representatives have embodied the political will of we the people” (Ackerman, 1988). Holmes furthers Ackerman’s thesis arguing that the imposed equilibrium among different branches of government makes it more sensitive to fluctuations in public opinion (Holmes, 1988: 230). He attaches to the separation of powers a strong democracy sustaining role considering its divide and rule maxim as “a strategy by which the governed might enforce their will upon their would be governors” (Holmes, 1988: 229). Thus, the separation of powers seem to create the

conditions for popular government. In the same line of argument, Schmitt argues that the organizational principle provides for mutual control and binding of the state apparatus, which does actually serve the other principle he assigns to the liberal constitutions –distributive one (Slagstad, 1988: 105).

According to Schmitt, the distributive principle designates the scope of individual freedom (Slagstad, 1988: 104). Because of their pre- or meta-political nature, human rights override the necessity of consent and are excluded from being subject of debate, redefinition and state intervention. In this respect, liberal constitutions serve two functions: they protect individual rights and form an obstacle to certain changes, which could have been carried out if the majority would have had its way. Although there is not a general consensus on the list of fundamental rights, they necessarily include rights that belong to individuals by virtue of being human and political rights that should defend man located in his respective political community.

Dividing the set of human into civil and political, constitutions regulate a division between the private and public spheres. The private holds the topics removed from the public scrutiny. Holmes maintains that constitutional insulation of certain rights insures a well functioning of the democratic process (Holmes, 1988).

1.3.3 Attributes of Constitutional Democracy

To turn back to our initial point of this section, constitutional democracy is a political regime self-bound with the rule of law, which organizes and sets limits to the activity of the state, and guarantees fundamental human rights. The web of constitution, democratic procedures and political activity operates under the umbrella of an unquestioned, impersonal, normative and rational law, which provides legitimacy by

virtue of being the product of human deliberation. Thus, the political activity is under the constraints of substantial and institutional standards designed to protect, complement and enhance democracy.

Consequently, in a constitutional democratic regime, the political process is almost by definition, directed towards democracy. Democracy is not left to forces of chance, reflection or choice. It is ensured through unquestioned determinant rules. In addition to the ambitious claim to democracy, constitutional democracy induces a set of political trends, whose not exhaustive list would be stability, discretion, continuity, normality, possibility of redefinition of the rules, and virtue economizing. However this is only an ideal model. It remains to be seen how it works in the very complex, challenging and fluctuating reality of the post-communist transition.

1.4 Democracy is too Important to be Left to Chance

1.4.1 Big Bang

The post-communist transition can be seen as the closest thing we have ever had to a big bang. It aimed at creating everything anew – elites, institutions, markets, rules, states, nations and even identities. Each of them is a piece of the story of success and/or failure. Together with the general feeling that the transition is not a success story, comparing with the great expectations at the beginning of the epoch, there is the prevailing estimation that by and large, Eastern Europeans have thrown down the walls, but have not built the bridges. And, it seems to be more difficult to construct than to demolish.

Countries in transition will still have to face problems of an unprecedented magnitude –they must build a new political system based on democracy, replace the communist order, create a new free market economy, come to grips with the transition logic and condense all these transformations, that took centuries in other parts of the world, in the course of few years. Thus, there is a variety of concerns remarking the post-communist transition in Eastern Europe: a) the challenge of simultaneous economic, political and social transformations; b) institutional vacuum that allows for abuses; and c) transition logic. The interaction of these main issues that constitute the context of Eastern Europe establish a unique environment, and certainly not the ideal one, for the development of democracy in the region. However, while dealing with a set of sometimes contradictory issues and resolving transition's dilemmas in a yet unsettled political milieu, the transition must guarantee a safe future to democracy.

1.4.1.1 Simultaneous Economic, Political and Social Transformations

Although transition in Eastern Europe is not a uniform process, with regard to its initial point, institutional design and outcome of the whole process, there is a broad consensus on the basic ingredients that has to go into any such system: constitutional democracy, competitive markets and a welfare state. These ingredients are believed to be correlated with the very motive of the transition, which in Elster's words is "an economic and political regime that will guarantee individual rights, ensure popular participation in decision making and generate equitable economic growth" (Elster, 1993: 267–275). Other observers of Eastern Europe add another reform ingredient, which is important taking into account the 40 years experience leaving without freedom

—changing attitudes of the elites and general public at large (Sayo and Losonci, 1993: 321–339).

On the pessimistic side, there are not few those arguing that, the price and ownership reform required to create a market system and constitutional guarantees for individual rights are an impossibility theorem. The hardships associating a total reformation of the economic system like increasing unemployment and bankruptcies will prove too hard to endure. Politically empowered masses may use their political rights to reverse the process. Democratic systems that do not deliver economic benefits are likely to be unstable in the long run (Elster, 1993: 267–275).

As a matter of fact, the transition process has taken dramatic colors in many aspects. It has hardly satisfied people's economic expectations with the majority of them believing they were better off during communist regime. The number of confused people convinced that their economic problems started in 1989 seem to be quite large (Evidence?). It has even enhanced nostalgia for the communist past none is proud of (Rose, 2001). Plagued by ramshackle infrastructure, illegal traffics of arms, drugs and prostitution, the transition economies are the scene of contradictory developments, which cannot always be associated with progress. Although the argument, that they may undermine each other is one of the ongoing questions of transition, successful transition cases among Eastern Europe countries have proved that economic reform can be reconciled with the democratic transformations.

Another troubling question of post-communist transition is the political culture accumulated through the communist regime. Law is attached a communist connotation, according to which law is bureaucratic, purposive and instrumental to state interest rather than people rights (Sayo and Losonci, 1993: 321–339). Popular and elite's

attitudes and beliefs do provide a serious obstacle to the flourishing of democracy and provide a serious challenge even when perfect rules are at place.

Consequently, some authors advocate the argument that “one can not take it for granted that people are unanimously for democracy” (Elster, 1993: 271). The post-communist political culture in Eastern Europe can emasculate democracy, but it does not infer that people ‘may not be for democracy’. Popular stance towards democratic rules and procedures should not be explained by the lack of desire for democracy but as a lack of experience with its rules and bitter experience with abuses under the name of democracy. On the other hand, the unpleasant and difficult transition has only added to the accumulated skepticism towards the new system.

1.4.1.2 Institutional Vacuum, which Allows for Abuses

The post-communist big bang has wiped out most of the social economic and political institutions, built up for decades. While the collapse of communism was fast and almost total, the recreation was slow and partial. Therefore, what we are left with is a social and institutional vacuum.

The social vacuum, expressed in the reluctant social reorganization, is partly a consequence of the widespread anomie of the post-socialist society. Being subject to an extraordinary fast change, people have hardly been able to adopt and have responded with what Bobinska refers to as “passive consent to the change” (1993: 305). She also argues that in most of the cases, if there was any reaction at all, it took the form of defending the interests threatened by the change.

In addition to the anomie produced by transformation itself, Eastern European society lacked the dynamism of a civic society, which until some years ago was seen as

the enemy of the people. One of the paradoxes of the transition is that a regime, which stands on the dynamics of grassroots initiatives and self-organization was introduced from above. The passivity of society and a well-rooted strong state did frame a perception of state as the main agent of change, as the rule maker, as the addressee of various expectations and as the source of conflicts (Bobinska, 1993: 305). The powerless society seems to have allowed for the development of a special bureaucratic-legal form of the state, which Sayo refers to as rule by law⁵ (Sayo and Losonci, 1993: 321–339).

Although Eastern Europeans have since the beginning of transformation opted for the development of the rule of law system, seen as a mean to protect society and human rights from an all pervasive state domination, most of the studies on the post-communist transition stress the wide gaps that exist between law and reality in the region. The prevailing argument is that these societies lack behind in developing a rule of law either because they failed in replacing their previous laws with proper ones or because the existing laws are poorly obeyed to. Both arguments pinpoint to two troublesome questions of transition: a) lack of state restricting laws and b) misuse of laws. The main source of both problems is the existence of a political elite, whose behaviors can hardly fit within the norms of a democratic system.

Mostly emerging from the round table negotiations, where communist elites were the main party negotiating the terms of the new regime, the post-communist systems are packed with dinosaurs of politics and/or embedded in compromises within interest-driven elites, which has put into question the new institutional arrangements. The

⁵ The rule by law underlines a special role for state in society. This form of law is attractive to all social and political forces that have an interest in maintaining some kind of etatist system mainly for the sake of their private interests.

negotiation with communist has served to question the impartiality, hence legitimacy of the post-communist laws. Feeling the danger of change, the elites made it sure to secure a privileged post in running the country and taking the biggest part of the public cake. Laws carrying their signatures do also bear their concerns. Laws that are questioned their impartiality and normative attachment is below the benchmark of being immune from becoming themselves the object of conflict.

The other problem with the rule of law is it has long been a facade rather than what Schmitt refers to as command. Many observers of transition process maintain that laws in Eastern Europe are written according to European standards and are applied according to Eastern standards. Legislation is one thing and the reality is another thing. The Eastern Europe political elite does escape laws in different forms, but today's main departure from the rule of law is corruption. Rose, for example, argues that in the post-communist states, the currency of privilege is money, and privatization has created great opportunities to reap profits (Rose, 2001: 101). Corruption and crime no longer exists in isolation with the state, if it ever did. Today's stakes are too big to be left to criminals. Thus, state has degraded in a network of interests and its institutions have degraded in a network of political clienteles (Rose, 2001: 103).

To conclude the panorama of transition, it is justifiable to say that the most political rights granted to people make no sense while those inside the government use elected office to pursue their interests. Therefore governors should be limited within precise borders and should be subjected to strict procedures, which enforce those borders. However, constitutional settlements can facilitate but, they do not resolve problems with the poor implementation of laws.

1.4.1.3 The Logic of Transition

The post-communist transition is a process whose characteristic features like institutional and social vacuum, abuses with law, knotty economic, political and social transformations, and the peculiarities of transition itself interact with each other. Its picture can be fully captured by considering all its bits and pieces. The logic of transition somehow completes a snapshot of the whole.

In the conceptual level, transition is characterized by uncertainty, arduously contested rules and a departure to something else. The post-communist transition includes all those elements with the difference that the “something else” is a defined goal –democracy. Thus, it can be conceptualized as a movement along the axis where democracy is one of the poles. However, being the arena of contested rules and other variables that do not always fit to democracy, transition can be anything but a linear process. As Bobinska puts it, transition is a period “with a dynamic of its own, which evokes tendencies contradictory to the logic of the democracy” (1993: 300). In line with her idea that transition should not be seen as instrumental to democracy but a period with its own dynamics, she advocates an important role of the state, which makes it possible to fill the gaps of unpredictable market, slow parliament and social vacuum. According to Bobinska, however, the measures undertaken to facilitate transition to democracy are justifiable as long as they guarantee a safe future to the later. Transition, in the long run, is instrumental to democracy. In the case there is a dilemma between empowering the state in order to deal with transition and bound the state in order to safeguard any aberration from the end goal, given the very reason of transition, the latter has priority.

1.4.2 The Constitutional Moment

To turn back to the main issue of this chapter, I now consider the prospects of constitutional democracy in the context of the post-communist transition. Does constitutional democracy work and how does it work in the very uncertain environment of transition?

An overview of the main challenges of transition left us with the bitter feeling of the unpredictability of the coming “something else”. The variety of transition components, which often get in the way of democratization, pose an important issue – does the transition process triumph in establishing a democratic regime? The answer seems to be case specific and dependent to the ingredients of each specific transition process. However, a part of the answer is that there are small probabilities that democratization triumphs over its competitors if it is not taken under the protection of fundamental law.

Democracy, one of the main reasons why Eastern Europeans opted for change and embarked in the process of transition, the dream of whole generations lacking most of the fundamental freedoms and subject to arbitrary ideological rules under the communist regime is important to be left to chance whatever form it takes: state, elites, masses, economic or political transformation, political culture or/and unpredictability. Democracy should be taken under control of rules, which cannot be reached by abusers and which take it under control. Constitutional restraints restraints can contribute to replacing the unpredictability of transition with reason, rule and legitimacy. Constitutionalism places the future of democracy in an almost certain path.

Moreover, transition provides a good opportunity for constitutional democracy to flourish and settle down, because it constitutes one of the rare moments of what Ackerman defines as “the constitutional politics” (1988: 162). This term stands for the highest form of political expression, because it provides access to the people themselves. It is a moment of direct popular sovereignty because people express their will in the spirit of republican tradition. And, transition provided the moment people of Eastern Europe could express their democratic aspirations. As a moment that embodies the revolutionary achievement, the constitutional politics is a way the democratic spirit of 1989 become a more permanent part of the political order in the region (Ackerman, 1992).

However, According to Ackerman, the principles decided upon during the extraordinary moment of constitutional politics should constitute the unquestioned rules of the normal politics (1988: 163). They should provide the bases for business as usual. Constitutions provide incentives for stability because among others, they prevent people to change their mind on important issues and create durable institutions.

On the other hand, Institutional arrangements create their own foundations within society and alter habits, routines and expectations of citizens who come to rely upon them. Observers credit constitutions with developing a public sense of constitutionalism and spread the idea and practice of the *rechtsstaat*. They can create the ‘spirit of constitutionalism’, which consists in considering basic political institutions as stable frames of politics rather than manipulatable tools.

Rigorous amendment procedures, a system of check and balances among branches of government and strict rights provisions, do constrain state’s ability to act. They assist in keeping a watch over politics and limiting the political space to

maneuver. However, although formal democratic rules embedded in constitutions are important in terms of democratization, rule of law needs to be fully established if ordinary people are to reap the full benefits of democratization.

1.5 Conclusions

My question is concerned with the correlation between constitutionalism, democracy and transition -how does constitutionalism effect democracy in the context of transition? It takes for granted that democracy is desirable. To quote Tocqueville, once the mankind has eaten the fruit of equality there is no way back. Hence, transition should be seen as a movement in the axis whose one pole is democracy.

The basic conclusion of this chapter is that, because democracy is too big a stake to be left to the mercy of transition's uncertainty, it should be taken under an impersonal, rational, legal, legitimate and unquestioned protection. Constitutional democracy is the surest path to democracy because it guarantees protection from both the ability of man to make a mess of things and the risk of a total big bang to drag democracy into its black hole. Moreover, the post-communist transition provides one of the rare constitutional moments to settle down democratic rules and an opportunity that the democratic spirit of the post-communist change becomes a permanent feature of Eastern Europe.

The constitutional democratic choice vacillates between two important factors: exogenous and indigenous ones. Lacking time to experiment with a third way, the post-communist designers surveyed successful democratic systems and the liberal constitutional tradition, which provided the "can not help it" factor. The indigenous component of the choice is a justifiable fear from concentrated power and human rights

abuses. Constitutional designers should be discreet to limit political authority by maintaining a division of power among government institutions and protect civil rights and liberties.

These conclusions are not to say that constitutions have a deterministic role in democratization. The political social and economic environment of transition seems to be an obstacle. Constitutions, however, assist democratization to the extent they encompass the best of the liberal constitution tradition, mainly the separation and balance of powers and a bill of rights, while providing mechanisms for the realization of those provisions in reality. The following chapters are intended to test the extent to which constitutions impact democratization in the post-communist environment, using the cases of Hungary and Bulgaria.

While constitutional provisions are one of the features of its democratic attributes, the legitimacy, hence the democratic elements of the constitution-making process seem to be as important as the output itself. The next chapter tends to explore the extent to which the constitution-making process makes a difference in terms of democratization and test it in our two empirical cases.

CHAPTER II:.

THE IMPACT OF CONSTITUTION-MAKING ON DEMOCRATISATION

2.1 Introduction

As it is argued in the first chapter, many students of democracy advocate constitutional restraints mainly based on three major arguments. First, favoring a deliberative type of democracy as opposed to a voluntaristic one (Holmes, 1995: 300), they argue that constitutions impose procedural hurdles on a tiny majority of the day as well as on the passionate behavior of the demos by forcing them to engage in a complex deliberative system. Second, through the principle of distribution and balance of power among the branches of government constitutions create the mechanism, which ensures that people's representative can not easily betray their electorates. Finally, constitutions are attributed the status of fundamental rules of the political game, that enables democracy to function effectively. Thus, constitutional restraints allow the political entity to organize in a deliberative, predictable and effective manner, hence enabling democracy.

However, the assumed relationship between constitutionalism and democracy is not that straight and forward. Whole generations of political scientist have struggled with the dilemma that constitutions impose a corset on the citizens and their representatives by taking away some power from them and putting it into the hands of constitutional framers. One of the main questions, such a dilemma inserts, is whether constitutions designed by a handful of people can serve to both the framers and the people at the same time. The problem associating the very genesis of the constitution is

how and at what extent it embodies the interest of the framers and what are their implications for the future of democracy?

In this context, many researchers have addressed the question of the optimal constitution-making process, which can help legitimize the output of constitution making that is the final constitutional document. This chapter is an effort to make use of the post- communist experience with constitution making to answer to the question of whether some kinds of processes can attributed more democratic credentials. In other words, what aspects of constitution making and at what extent do they generate democratic results?

My hypothesis is that the constitution-making process is relevant, but they can not be attributed definite democratic credentials. My findings suggest that the post-communist experience does not provide enough evidence to construct an optimal constitution-making process.

This paper is structured in five parts. In the first part, I look at the political choice of designing constitutions within a neo-institutionalist analysis, which links rational choice and institutionalist approaches. Neo-institutionalist arguments infer three important conclusions, which correspond to three main factors influencing constitution making: first, political institutions restrict the realm of action of the political actors; second, rules are made by actors on whom the formal power to decide has been purveyed; third, post-communist context provides certain opportunities for actions. In the second part, I consider constitution-making frameworks, depicting the factors and aspects, which can be relevant for democratization. The literature review on the topic is intended to complete Elster's framework of Constitution-making. Among the variables influencing democratic attributes of the constitution-making process, I study the timing

of constitution making, the body, which drafts the constitution and the way the constitution is adopted.

Testing the impact of constitution-making process in the cases of Hungary and Bulgaria suggests that in spite of the doubtful legitimacy of the constitution-making process in the former, democracy does not fare better in the later. Therefore, constitution-making process has limited explanation power in terms of democratization. However, adopting a constitutional-settlement, be it interim as in the case of Hungary or permanent as in the case of Bulgaria, proved to be an indispensable dimension of democratization, to the extent it provided more or less democratic rules of the political game.

2.2 The Political Choice of Designing Constitutions

Constitutions and constitution making have until recently been studied within the framework of the constitutional law and legislative processes. On the assumption that constitutions are legal texts, they were seen as the concern of lawyers. Following the renewed interest of political scientist in institutions, however, constitutions have increasingly become subject to political science's inquiry. In this context, constitutions have first and foremost come to be seen as "the hour of the politicians." Constitution making, thus, has come to be seen as a political activity where political choices of a given system like access to and distribution of power and authority, rules of representation, sources of legitimacy, and forms of liberty and equality are made. As Zielonka puts it "constitution-making is perhaps the quintessential political act, by which countries make choices concerning the most fundamental concepts in political life" (Elgie and Zielonska, 2001: 25)

Seen as a political choice, constitution-making is subject to a theoretical debate among rational choice and institutionalist approaches, which offer quite different explanations to the question of the political process. Are political decisions more adequately understood in terms of intentional action guided by individual preferences as assumed by rational choice theories, or are they an outflow of institutional structures and procedures? According to rational choice theory, decision-making can be explained in terms of rational action and self-interest of the individual agent (Heritier, 1996: 26). However, the assumption that constitutional choices are thoroughly driven by political leaders' individual interest is vulnerable to two critiques. First, the individual actors decide under a "veil of uncertainty" about the consequences of their decisions. Second, they hardly know with certainty what their preferences are. Institutionalists like Krasner, on the other hand, conceive of institutions as "building blocs of politics, [which] influence available options for policy-making and institutional change. They also influence the choices made among available options" (Krasner, 1983).

Assuming that "political sciences can only lose if one approach is used exclusively" (Heritier, 1996: 29), neo-institutionalists approaches seek to link these two analytical perspectives, thus providing a complex analytical framework, in which decisions of rational self-interested actors matter at the extent they are constrained and constituted by the institutional structures.

In an effort to relate institutional structures and the single rational agent, Heritier distinguishes among three links. The first link, she proposes, is Jon Elster's two-filter model. It asserts that the "individual agent chooses among a 'feasible set' of alternatives" (Elster, 1979: 113). The first filtering processes are structural constraints such as the institutional arrangements, rules and value systems of a society. Thus, the

constitution makers' choice is the second filtering process because they can only chose among a set of options available given the institutional and rule constrictions.

The second link between rational choice and institutionalist explanations is to be found in the fact that institutions originate in people's choices (Heritier, 1996: 36). The thrust of argument is that constitutional choices embody the interests of their creators, however, institutions turn out to constitute constrains on their creators. As Giddens points out "institutions expand, so widely in space and in time, that they escape the control of every individual actor" (Giddens, 1988: 78)

The third link in Heritier's analysis is the capacity of institutions to unfold opportunities for action in addition to restraining the alternatives of action. Institutional structures are believed to convey general rules of action, but they leave enough room for self-interested and strategic action, hence providing both restrictions and opportunities. This infers that it makes a big difference who the political actors are and what sources they have to obtain advantages in filling out the rules. On the other hand, the capacity of actors to influence institutions, thus the design of institutions, seems to be contingent to the political context where the interaction occurs (Heritier, 1996: 37).

The three links we have already outlined provide us with the analytical framework to study the factors influencing the constitution making process. First, the institutions already in place at the incipient moment of constitution making provide the available set of choices for the constitution-makers. The institutional structures, which were in place during the constitution-making process were the communist constitutions and the negotiated agreements of Round Table Talks⁶ (RTT). The outdated communist

⁶ The national roundtable as an institution, as a legitimization device came to Eastern Europe from Spain, but it gained a greater significance in the former, where it also worked as a legitimization device. The

constitutions had little credibility and almost no relevance in the post-communist political condition because they were seen as hurdle-legacies to be overcome in the transition process. RTT negotiations, on the other hand, were the main institutional arrangements at the beginning of the transition as they made the macro-choices on fundamental regime characteristics and supplied the initial rules of the political game. Choices in favor of peaceful transition to democracy, free elections and other democratic provisions were already made during the RTT (Agh, 1998: 85). Thus, the round-table negotiations were important structural factors to determine later constitutional choices.

A second factor, which seems to impact the constitutional design, are the political actors and their capacity to dominate the negotiating process as well as to choose the provisions that advance their self-interest. Taking into account that the moment of regime transition is characterized by a set of volatile rules, where the old institutions are highly contested and the new ones have yet to be habituated to, there is a golden opportunity for political actors to push for self-interested choices. At the very end, constitutions are designed by a group of people and embody their choices. The question is not if, but to what extent, constitutional choices embody their creators' interests?

Third, the context in which RTT took place and the political authors made their decisions provides opportunities and/or restrictions. Thus, we have determined three major variables that determine constitutional choices –the round tables, the political actors involved in the process and the post-communist context. However, they are

ruling parties of the former system were not legitimate for the populations any longer, but the new opposition forces as yet did not have democratic legitimacy before the elections. To cut this knot, these chief actors accepted each other as legitimate partners with whom to talk. (Agh, 1998: 85)

themselves subject to a set of processes, which will be the subject of the fourth part of the chapter.

In addition to analyzing the factors that influence constitution-making, in the framework of the political choice perspectives, this chapter is conceptualized based on Schmitter's conceptualization of constitution-making as a process and an output (Elgie and Zielonska, 2001: 24). The process is the means by which the constitution is drafted and adopted and the product is the constitution itself. The process affects the final output and also provides the immediate conditions in which the output then operates. The process of constitution making will be the main focus of this chapter.

2.3 Constitution – making: Factors and Processes

Constitution making has until lately been studied in particular constitution-making episodes within the framework of ordinary legislative processes. Elster identifies the lack of proper studies on how constitutions are made, by asserting that “there is not a single book or even article that considers the process of constitution-making as a distinctive object of positive analysis” (Elster, 1997: 123).

Consequently, he seeks to categorize the various modes of constitution making and focuses on framers' motivations in understanding the constitutional document they produce. With regard to the modes of constitution –making he distinguishes among several categories: internally imposed constitutions, whose main characteristic is being imposed by a sovereign lawmaker without any consideration of the will of the political elite; externally imposed constitutions, which are drafted and imposed on the political community by a foreign power; constitution-making under imposed constraints, which

permits the framers some choices within imposed constraints effecting procedure or/and substance; constitution-making in the form of contract between the ruler and social or political elite; minority constitution-making, which implies that constitutional framers represent a segment of the community; constitution-making by elite accommodation, which consists in an agreement among the elites, but lacks popular consultation; and constitution-making by directly or indirectly elected assemblies (Elster, 1997: 132).

Most of Elster's categories are differentiated in terms of the actors involved in the constitution-making process. He develops his approach to constitution making based on framers' motivations, which are defined within the trichotomy of reason, interest and passion (Elster, 1997: 135). In addition, he distinguishes between three kinds of framers' interest: those of the framers themselves, of their constituencies and of the institutions they belong to. However, while considering the impact of reason versus interest, Elster advocates Buchanan's argument that people are swayed by impartial arguments, when uncertainty about the future induces them to put themselves 'in everybody's place' (Elster, 1997: 131). Thus, Elster's framework emphasizes the role that actors' motivations play in constitution making, but it also draws references to the institutional dimension of constitutional choices and establishes linkages with the context.

Elster also seeks to build a normative theory of constitution-making by designing an optimal structure for constituent assemblies. The most important features he attributes to the optimal constitutional making is that constitutions be written by specially convened and broadly representative assemblies, be dictated by political rather than technical considerations and be designed within time limits (Elster, 1997: 138). The normative model he inserts seem to be based upon the body who drafts the

constitution, its representativeness and the time frame of designing the document, but those aspects of constitution-making he refers to are not clearly distinguished.

2.3.1 The Factors Shaping Constitution-making

The analysis of the factors effecting the constitution-making process in CEE is furthered in the empirical studies of Elster, Offe and Preuss, who concentrate on actors' input in the process; Agh, who emphasizes the institutional constraints on the actors' choices; and Stephan and Linz, who contribute to the literature by studying the impact of the past to the paths of transition.

Elster, Offe and Preuss establish connections between the past and the future, related in their concept of the extrication mode, which according to them seems to effect the agency of transition, hence constitution-makers also (1998: 63-156). Agh, looks at the extrication period through the lens of transitory institutions, mainly RTT, which serve to link but also separate the past from the future (1998). For Linz and Stephan, however, the past, mainly the previous regime type, constitutes an independent variable determining the availability of different paths to transition (1996: 3-83). Let us, now look at how the past, actors and institutions influence the recent wave of constitution making in CEE.

In their comparative study of institutional design in post-communist societies, Elster, Offe and Preuss seek to give an account of the political procedures, forces and issues, which shaped the recent wave of constitution making in the region. Analyzing the making of the new constitutions the authors draw strong reference to the actors, who dominated the process, which they sum up as both arguing and bargaining. Arguing stands for the framers' attempt to offer impartial arguments by referring to common

interest, public good, individual rights and democratic values. Bargaining, on the other hand, refers to framers' efforts to utilize threat-based arguments in order to get their way (Elster, Offe and Preuss, 1998: 77)

Their empirical study of Eastern Europe enlarges the scope of Elster's framework of constitution-making process by adding the variable of modes of extrication⁷ (1998: 48), which influences the constitutional choice. The correlation between forms of extrication and constitutional choices is established based on the assumption that the overthrow of an existing regime by a violent revolution tends to produce unstable democratic systems and, on the other hand, Bauman's conceptual distinction between systemic and political revolutions. While political revolutions adjust a political regime and are launched by actors that represent collective 'transformative' interests, the agents of systemic revolutions dismantle the whole regime finding themselves in a situation when society and its actors have still to be (re)constructed (Bauman, 1993). Thus, the authors maintain that the peaceful, transformative and systemic elements of the mode of extrication determined the actors who controlled the course of the events and left lasting institutional traces on the new policy" (Elster, Offe and Preuss, 1998: 53)

An important institution of the extrication process, which most of the countries of Eastern Europe shared is the RTT. Their influence extends beyond the extrication process because they established the institutional foundations of the future order, mainly by creating the institutional framework for free, fair and competitive elections.

⁷ Extrication is defined as the countries disentanglement from the main political properties of communist regimes such as dominant power positions, the comprehensive state and public control of the public sphere etc. This period started when the regime was challenged by opposing groups and ended when the main features of the new order were established

The impact of round tables was also important given their success to avoid violent forms of regime change and provide the conditions for a peaceful formation of the new order (Elster, Offe and Preuss, 1998: 57). Thus, the mode of extrication, in terms of the round table devices, seems to have affected the structure of the newly created polity.

But, the extent to which modes of extrication led to specific structural provisions is left open because of the empirical evidence that “extrication period leads to actions and decisions which are thoroughly contingent upon individual persons, situations and circumstances” (Elster, Offe and Preuss, 1998: 58). Thus, Elster, Offe and Preuss identify only tentative links between the mode of extrication and institutional outcomes, while stressing the relations between the extrication mode and the actors’ space of action. Their model of extrication is an actor-centered one, to the extent it develops along two criteria: inclusion or exclusion of the old elites and their exploitation of available spaces of action for investing in creating new institutions or accumulating power (1998: 54).

The assumption that the extrication form serves as a vehicle for the transfer of past legacies to the future, is elaborated in a systematic way in Linz and Stephen’s hypothesis that previous regime types determine transition paths and the availability of pact as a transition option (1996: 3-83). Their analytical framework to study transitions, in addition to previous regime types includes actor-centered variables, mainly the leadership base and actors who control transition, as well as context-centered variables. Their work is relevant to our analysis of constitution-making factors to the extent the previous regime, in the form of the political space it permitted in terms of pluralism, ideology, mobilization and leadership, the actors of transition and the context, helps us identify the main political actors and the negotiations they could engage in during

transition. Linz and Stephen's study suggest that the transition to democracy in Hungary and Bulgaria can be summed up as respectively negotiated transition from mature post-totalitarianism regime and controlled transition from early post-totalitarianism (1996: 56).

Agh, adopts a more institutional sensitive analysis to transition. He studies the function of RTT around the region, maintaining it is a central transitory political institution with regard to its function during the extrication process and long-term impact on the future of the polity. He attributes to those institutions the main decisions like the ones that "there would be no revolution, that this change would have a lawful constitutional character, [but would] move ahead with this legal order progressively and gradually towards democratization" (Agh, 1998: 85). Moreover, utilizing Pridham's differentiation between macro, meso and micro-choices (Agh, 1998: 84-87), Agh asserts that the macro-choices were made in favor of democracy by the RTT (1998: 85). The RTT were the institutions that decided about the basic arrangements and prepared the basis for the first elections as the foundation of the new democratic systems.

While emphasizing the role of RTT as the main transitory institutions, Agh furthers the analysis of the institutional factor by studying the constitution-making process, which is credited for establishing the meso and micro-choices. Constitution making is the following sequence of the democratic institutionalization because the meso and micro politics could only be articulated within a political space more or less already arranged by macro-choices. Therefore, Agh institutional analysis establishes a direct relation between the round table negotiated issues and constitutional choices to the extent those negotiations provided the macro-choices, in which constitutional design had to fit in.

Thus, studies of Eastern Europe suggest that political actors were the main factor shaping constitution making. However, it also hints that constitutional choices are subject to the macro-choices and other structural constraints agreed upon in the round table talks. Therefore constitution making in Eastern Europe seem to fit to Elster's definition of it as a process of both arguing and bargaining. While arguing involves mainly subjection of actors' motivations to different constraints, bargaining evolves around the capacity of framers to push for their interest-based choices. Both the actors' capacity to bargain and the need to justify their interests with arguments seem to depend, to a large extent, on the mode of extrication, which defines the political actors and their spaces for maneuvering. Constitution-making in Bulgaria and Hungary will provide us with empirical data to test the impact of the extrication mode, political actors and institutions in the process.

2.3.2 Aspects of Constitution-making Relevant for Democratization

Elgie and Zielonska further Elster's analysis of the constitution-making process by establishing the criteria that Elster's typology of constitution-making lacks. Their units of analysis are those aspects of constitution-making process that seem to be relevant for the consolidation of democracy –how long it takes to prepare the constitution; who takes part in the constitution drafting process; and how the final document is adopted (Elgie and Zielonska, 2001: 34).

Before going into details about the significance of each aspect, it will be worth explaining why the constitution-making process is important. An argument could be that the legitimacy of the means by which the constitution is drafted and adopted, the constitution making, is the basis of constitution's legitimacy. The constitution-making

process creates the immediate conditions in which the constitutional output then operates. Therefore, if the constitution making is consensual and legitimate it is very likely that the output will also be consensual and legitimate (Elgie and Zielonska, 2001: 35). But, how and at what extent aspects of constitution-making determine its democratization attributes?

2.3.2.1 The Timing of Constitution-making

The debate on the optimal constitution-making moment became tense following the collapse of communist regimes and the need to redefine the fundamental rules of their political system. One view advocates that a quick process is better than a slow process. McWhinney advocates this argument on the basis that codified constitutions occur, “in or immediately after a period of great public excitement and resultant public euphoria, when it is relatively easy to build a certain climate of popular political consensus” (McWhinney, 1981: 15). Another advantage of a quick fix solution is that “constitutions that are written when the relation of forces are still unclear are likely to counteract increasing returns to power, provide insurance to the eventual losers, and reduce the stakes of competition” (Przeworski, 1992: 87). Thus, quickly written constitutions seem to have the advantages of easily attained consensus grounded in public euphoria and relative stability because the actors’ yet unconsolidated interests facilitate their agreement on relatively fair rules.

Although traumatic political events may bring about political consensus the problem remains if the public element is ripe enough to be conducive to writing a sustainable constitution. The opposite view on the optimal constitution-making moment emphasizes that a constitutional settlement can be achieved after a long process of

bargaining. Because stable constitutions require the achievement of consensus among contending political forces, the writing process should be long enough to allow the political actors reach a sustainable agreement. Thus, a long process of negotiation seems to have the advantages of sustainability.

The problem with a long process of bargaining, however, is that given the crisis of legitimacy plaguing all communist regimes and the volatility of the post-communist condition, countries could hardly afford to prolong the process of bargaining on the new rules. It would risk leaving their political systems fall prey to uncertainty , at best, and to chaos, at worst. Therefore, in most of the countries across the region there was an emergent need to redefine the rules of the game.

The intermediate position advocates an interim solution. As Holmes puts it “new democracies may benefit considerably from quickly adopting an interim constitution, while work continues on a permanent constitution” (Elgie and Zielonska, 2001: 36). This view maintains that a long period may be necessary to reach agreement on a complete set of rules, but it also asserts that it is necessary that some rules be functional as soon as possible. Interim constitutions have the advantages of both a quick and prolonged constitution-making process. It also seems to reduce the problems each approach has.

The interim constitution embodies the macro-choices of democratic regime, facilitates institutional change and frames political actors’ negotiation on meso and micro choices. It internalizes into the system the major demands of the democratic revolution without falling prey of mass euphoria because it allows for the evolution of rules in the form of ongoing bargaining. Thus, the interim constitutions’ long run advantage is leaving open the options for change and adaptation, while framing them

within already established macro-choices. This seems to be important, especially given the rapidly changing socio-political environment in post-communist countries.

The interim settlement, however, does not go unchallenged. One of the problems with the interim constitution is reflected in Schmitter's concern that a long period of constitution-making may reduce the possibility of attaining consensus, because with the passing of time, irreconcilable political interests can be clearly formulated and consolidated (Schmitter, 1998: 8). On the other hand, the adoption of some rules may simply dwindle the momentum for adopting a constitution.

As this debate makes clear, each solution with regard to the timing of the constitution making has its advantages as well as its disadvantages concerning democratization. Moreover, the time variable seems to be far from deterministic. The legitimacy and stability of the constitution depends from a set of factors rather than merely the timing of the process. However, as Elgie and Zielonska suggest, the adoption of interim institutions, where final drafts were not adopted, seemed to be indispensable (2001: 37).

As such, constitution-making in Hungary and Bulgaria will serve to illustrate some of the advantages and disadvantages of quick fixed and interim constitutions rather than establish correlation between timing and democratization.

2.3.2.2 Constitutional Framers

The legitimacy of the constitution seems to depend, to some extent, on who takes part in its design and how representative the framing body is. More representative constitution-makers are, more legitimacy the constitution will have. Therefore, the actors that are formally assigned the duty of drafting the constitution matter.

In addition to who participates and their representativeness, how framers fulfill the constitution-making task seems to be important in terms of legitimizing its product. In democracies there are two basic methods: making a constitution by a constituent assembly and by an ordinary legislature. They differ from each other from the duties they have to perform. A constituting assembly is primarily charged with creating a new constitution and it is dissolved after its adoption. Such was the assembly that drafted the Bulgarian constitution in June 1991. The national assembly, on the other hand, is charged with designing a constitution while functioning as a legislative body. It continues to do so after the adoption of the constitution.

The debate on the optimal type of framers evolves mainly around the constituent assembly and legislature. Some advocate the convention of an ad hoc assembly, which has the sole task of drawing up the constitution of an emerging regime. The argument behind this position is that constitution making is a very important moment in the history of a country because it makes the fundamental choices of the future polity, therefore, those carrying this task should be selected exclusively. Ackerman, for example, supports the American model of a constitutive assembly because it provides the constitution with the highest degree of political legitimacy and prevents the dangers of endless constitutional tinkering and the mixing of constitutional law with ordinary legislation (Ackerman, 1992: 37).

On the opposite side, Arato argues that the American model is superior only in theory, because it is difficult in modern cultural and institutional conditions to imitate 18th century American choices. As such the second best option is parliamentary constitution making (Elgie and Zielonska, 2001: 38).

Most of the countries in Eastern Europe adopted the second option. The case of Hungary will illustrate the example of a constitution, which was amended to the extent that it amounted to a new constitution by the non-elected parliament. Bulgaria is one of the few cases, which called a special constitutive convention to formulate its new constitution. Both the case of Hungary and Bulgaria seem to conform to Elgie and Zielonska's findings that Eastern Europe's experience does not provide sufficient evidence to claim that certain groups of framers are likely to generate a special kind of political legitimacy" (2001: 39).

2.3.2.3 The Ratification of Constitution

The ratification of constitution can also be important, mainly because constitutions require a special kind of legitimacy, which transcends the normal law. Thus, the argument goes that since democratic constitutions are supposed to be a kind of social contract, referendum, by giving to the people the right to make the final decision, solidifies constitutions consensual character. Referendum combines the representative and direct elements of democracy. More correctly, it supplements the representative version of decision making by involving the people.

In the context of Eastern Europe, the debate on referendum was a major issue. In addition to raising the legitimizing question, the debate on referendum evolved around revolutionary circumstances and consequent greater demands for referendum. Ackerman is among the loud advocates of referendum on the basis that if lacking a direct mandate from the people "the constitutionalization of revolution can not occur" (1992)

The opposing view uses the revolutionary environment to articulate a different argument. They refuse the adoption of constitution by referendum on the basis that revolutionary circumstances increase the chances for referendum to be abused. A highly unstable situation and a public, which by and large lacks the political culture of participation and self-decision make the referendum vulnerable to manipulation. Empirical studies across Eastern Europe provide ample evidence of irregularities in the referendum procedures, which hampered constitutions legitimacy. Therefore, a formal referendum does not say much about constitution's legitimacy

In Hungary, the issue of referendum was not even raised because a formally new constitution is not agreed upon yet. In Bulgaria, a referendum was pre-arranged, but it was then called off mainly because of the fear of the BSP (Bulgarian Socialist Party which was the dominating force in the constitutive assembly) that the opposition could mobilize the population against the referendum. However, the fact that the constitution was not endorsed by public vote has hardly affected its functioning.

2.4 Bulgaria: A Controlled and Quick-fixed Constitutional Agreement

The Bulgarian case can illustrate the benefits and disadvantages of a quick-fixed constitution designed by a constitutive assembly. In addition to offering useful insights on the constitution-making process, mainly timing and type of framers, Bulgaria can illustrate how the past, the actors involved and institutions at place effected constitutional choices and how in return institutions reflect but also escape the intentions of their creators. Finally, Bulgaria's new constitution seems to have been attributed the role of "the first episode in a large scale engineering, which was an indispensable step towards democratization" (Ganev, 2001: 193).

The Bulgarian constitution-making will be studied in three parts. The first part looks at Bulgaria's immediate past in order to identify the transition actors, their negotiating capacities and the consequent transition paths. Then we proceed with the study of round table negotiations as an important transitory institution, which set the rules for the first elections, the presidency and the adoption of the new constitution, thus making the macro-choices of the future regime. Finally, we will study the dynamics of constitution-making process and the impact it had in structuring the future of the new polity.

2.4.1 Controlled Transition

As we have argued before, the past is an important factor influencing transition and the institutional choices that shape the future. While the past deserves a detailed study because one can invoke historical arguments going back into centuries, because of the limited task of this study, we will focus at those elements of Bulgaria's immediate past, which can be given credit for the element of continuity in its transition to democracy.

A systemic analysis of the Bulgarian previous regime is provided in Linz and Stephen's work on transition to democracy. The argument underlying their study of Bulgaria is that "the early post-totalitarian regime initiated and never lost control of the transition and that the leaders of that regime emerged from the first free elections not only with a plurality of the vote but also with a newly reconstituted claim to power" (1996: 335). In spite of some pactured elements of the Bulgarian transition, it was mainly a reform transition. Moreover, the political elite of transition is attributed a

‘consumptive’ exploitation of the emerging space for action, which amounts to their accumulation of power (Elster, Offe and Preuss, 1998: 59).

By 1987, in parallel to the Russian perestroika and glasnost, the General Secretary of the Bulgarian Communist Party (BCP) initiated the economic reconstruction program and some steps towards liberalization. But, these reforms remained marginal and the opposition emerged as an effective force only by 1989. As power is relational, the weakness of the opposition meant strength for regime forces. Thus, in terms of pluralism, Bulgaria unlike Hungary still approximated totalitarian ideal type in 1988.

In November 1989, Zhivkov’s communist regime had officially ended as a result of an internal party coup engineered by the communist party members. By then, some independent groups had already emerged. Ecoglasnost, for example, became the first group capable to carry out coordinated public protests against the regime in October - November 1989. However, the opposition forces were weak and Zhivkov was forced out of office only to be replaced by another committed communist leader like Mladenov. At the beginning, Mladenov had limited intentions for reform, but being faced with growing popular pressure he felt obliged to take some steps towards liberalization. One of the most important of those steps was the removal of article 1 of the constitution, which declared the communist party to be the sole political force. More importantly, the regime forces entered into limited negotiations with the opposition (Bell, 1993: 83-97).

2.4.2 RTT and Continuity

Talks between the regime forces and the opposition started in January 1990. A characteristic of Bulgarian RTT, which underscores the element of continuity was that a member of the Communist Party, Lukanov, was the one who coordinated the preparatory meetings, presided over the talks, determined the agenda and guided the discussion (Linz and Stephan, 1996: 338). Thus, the Bulgarian negotiations were in marked contrast with the Hungarian ones, where the democratic opposition held its own talks and set the principles of negotiation with the government before they even agreed to enter into negotiations with the government forces.

However, the Bulgarian case, at least partly, confirms Giddens' assumption that institutions escape the narrow interests of their creators. In the same line of argument, Agh suggests that RTT were a device for negotiations, which in spite of the dominance of former communists, served as a constituent assembly (1998: 85). Thus, although the RTT were initiated and presided over by the former regime representatives, the talks culminated in a series of agreements, which included concessions to the regime forces but also real compromises between the two parts.

The RTT evolved around issues that crystallized change. The issues on the agenda were mainly on the nature and power of the presidency, the timing of elections, the choice of the electoral system (Elster, Offe and Preuss, 1998: 69). The regime negotiators had their way on the timing of first free elections as the parts agreed to have early elections in June 1990, although the fledging opposition would have preferred a latter date in order to have time to organize. The electoral system that was agreed upon was a compromise between majority voting asked for by the communists and proportional voting demanded by the opposition. Another concession to the opposition

was agreeing upon a weak president, although the regime negotiators would have preferred a strong presidency on the assumption the communist candidate would fill it. Mladenov agreed to become the president until the first elections for the national assembly, which was also charged with promulgating a new constitution within only 18 months.

Thus, the RTT set the framework for democratic change and founded the basis for institutional transformation at the same time they served as a bridge to relate the past with the future because of being dominated from ex-communists.

2.4.3 Constitution-Making and its Impact on the New Polity

In the first elections of June 1990, The Bulgarian Socialist Party (BSP), which was the communist party with a changed label, emerged as the main victor able to control the constitutive assembly. The main task of the assembly was to draw up a new constitution, but by the beginning of 1991 there was little progress in that direction, mainly because BSP was interested to postpone the round of the next elections. The opposition, whose main party was the Union of Democratic Forces (UDF) took a critical position by blaming BSP for postponing the adoption of the new constitution against the promise it gave to the electorate. President Zhelev, from the opposition, who had replaced the communist one following his resignation in August 1990, exerted pressure on the assembly to agree upon a constitutional settlement immediately. He even set a deadline –July 1991. BSP facing pressure from both the public, opposition, and the president concentrated on constitution making and observed the deadline set by the president. When adopted in July 1991, it became the very first wholly new

constitution to be adopted in the region. The solution came fairly quickly, but it remained to be seen what it had fixed and what it had not.

Although there were talks for a referendum, the constitution was adopted by the assembly given its fears that the public could have failed to endorse the document. Thus, the referendum called at the beginning was called off. In addition, the constitution was not ratified unanimously by the assembly. The opposition was highly critical to the constitution. Most of the radical deputies of UDF and all the deputies of the Movement for Rights and Freedoms (MRF), which represented the Turkish minority in Bulgaria were either absent or voted against the constitution. Other groups abstained. Some radicals in parliament even went in hunger strike as a sign of protest. In any case, the constitution was approved by 309 out of 400 votes (Verheijen, 1999: 105-153).

As a matter of fact the Bulgarian constitution has been criticized in many respects. In addition for being blamed for rapid work Elster, Offe and Preuss argue that the document has more than its share of ambiguities and inconsistencies and in some respects it is also quite illiberal, reflecting the communist dominance in the assembly (1998: 74). The illiberal provisions can be mainly found on issues of minority rights. Ethnic groups are prohibited to create political parties and do not have the right to study in their own language. MRF stiffly opposed the constitution on the grounds that it failed to protect minority rights. Other provisions in the constitution are criticized on the grounds they reflect the interest of former communists to protect themselves against criminal prosecution and demands for restitution of property (Elster, Offe and Preuss: 1998: 74).

In addition to the above conundrums Ganev identifies some problems, which provoked attempts to change the constitution. For example, the constitution does not

contain any solution on governance during the interim periods between two governments, which can lead to risks of an unbridled executive power. Reflecting the hypothesis on institutions interest, Ganev also suggests that the assembly assured for itself a clear supremacy versus the president, although the president is popularly elected (2001: 186-211). However, the constitution proved to be sustainable and those problems were never synthesized in concrete proposals and amendment initiatives. According to Ganev, the working of constitution is made possible by a shared perception among both party leaders and the citizenry that “ambitious projects to revamp the constitution are likely to generate marginal benefits at best, while levying incalculable costs on society as a whole” (2001: 192).

Despite problems with constitution making and its output there is plenty of evidence that Bulgaria is a functioning democratic system. Looking from the perspective of previous regime type, Linz and Stephan hypothesize that Bulgaria’s “over performance” in democratic terms can be explained by its institutional choices – initial use of the parliamentary framework and its continued use of proportional representation (1996: 342).

In the same line of argument, the early constitutional settlement can be attributed an important function in the democratization process. First, it has injected stability and predictability in the very volatile post-communist environment. Although UDF and president Zhelev refused to endorse the constitution, they soon found themselves victorious in the October 1991 elections organized under the auspices of the constitution. Thus, as Ganev argues, the most significant success of a quick-fixed solution was achieved –peaceful transition of power (2001: 192).

Second, the Bulgarian constitution seems to have stimulated some democratic behavior and a minimum of respect among elites by institutionalizing incentives for elite behavior. The general framework of rules and procedures set up in the constitution has served to channel the animous interest-ridden behavior into norm-patterned interaction. At the very least, the constitution assisted into the creation of a new political discourse, through which political parties struggle for power. The new, institutionalized and rule framed political discourse has contributed to the normalization of irreconcilable controversies.

Third, by specifying and balancing the roles of each branch of government the Bulgarians avoided institutional chaos and a possible tyranny of the majority. Judiciary independence rooted in constitution has successfully stalled some attempts from BSP to tip the balance in their favor, as it did by declaring void an effort of BSP led parliament to curtail the powers of president.

Finally, the constitution seems to have enhanced democratic inclusion in terms of accepting a broad array of individual and minority rights. In addition to all classical rights the Bulgarians are blessed with comprehensive social rights (2001: 197). An example illustrating the inclusion of previously excluded minorities in the political process and their right to claim protection is the case when the constitutional court refused to declare unconstitutional the MRF. Although the protection of MRF was related to the independence of the judiciary rather than constitution itself, it would not have been possible without the constitution's role in designing roles and practices. This confirms to Ganev findings that constitution has played the role of scaffolding around which new institutional practices coalesce (2001: 199).

2.5 Hungary: A Negotiated and Evolutionary Constitutional Arrangement

Hungary has been one of the most studied countries among the post-communist transitions because of its negotiated transition and its very complex process of constitution-making. Most of the analysis of the Hungarian constitutional transition evolves around the actors' capacity of negotiating, the institutional choices they adopted and the flexible constitutional framework they used.

Although there is little disagreement that Hungary proved to be among the most successful cases in terms of its democratic achievements, the problem, as Szikinger argues, is that “the declaration of universally accepted constitutional values was codified and institutionalized with dubious political legitimacy” (2001: 406). This discrepancy between successful democratization and problematic legitimacy of the rules of political game makes Hungary an interesting case for elucidating the main question of this study –does any sort of constitution-making produce a workable democratic system? Put differently, Hungary can help us explain the extent to which constitution-making process impacts the future of democratic polity.

Hungary shows that the question is not straightforward. The constellation of variables like past regime type, the actors involved and the institutional choices at the very beginning of transition help us understand the constitutional choice –an interim, malleable constitution agreed upon by the old and new elites, and which served well during the transition process. However, the process itself, in terms of utilizing a constitution adopted by a non –elected assembly and leaving open the choice of a final settlement has put into question the democratic attributes of constitution making in Hungary.

The constitution-making process in Hungary differs from Bulgaria whose constitution was adopted by a democratically elected constitutive assembly in the course of only 18 months. These different choices seem to have produced different results. While it is argued that the Bulgarian constitution constricted and normalized the political conflict, Hungary's constitutional settlement left ample space for the domination of partisan interests of political elite in the political process.

The case that democracy does not fare better in Bulgaria than in Hungary, however, suggests that other factors are at play in addition to constitutional making. Having said this, we accept that constitution making cannot, solely, be invested with democratization tasks. The analysis of factors like previous regime, actors and institutional choices helps us explain Hungary's successful transition to democracy in spite of a questioned constitution-making solution.

This study of Hungary proceeds in a chronological order but concentrates on the factors influencing constitutional choices and the process itself. The first part looks at previous regime type in Hungary and identifies the political actors and agendas that affected the course of events. The marked difference between Hungary and Bulgaria is that at the moment of change, Hungary had a well-organized political opposition, while the moderates were already at the helm of the communist party. The second part analyzes round table agreements, which set the background for an evolutionary constitution making. The important constitutional choices agreed upon in RTT set the direction and the limits of consequent steps of constitution making. The third part aims at explaining the advantages and disadvantages of Hungary's pliable interim constitution and the prolonged final agreement.

2.5.1 The Resurgence of Opposition

There has always been resistance to the communist regime in Hungary. The failed revolution of 1956 was one of the symbols of this resistance. The successor of the executed leader of the 1956 revolution, Kadar proved to be a soft communist and advocated political alliance claiming that “those who are not against us are with us” (Linz and Stephan, 1996: 298). In addition, he launched several reforms, mainly in the economic realm. The new economic mechanism introduced in 1986 proved to be the most pervasive experiment of any communist country with market economy. Extensive changes, however, started with the inclusion of the 1968 reforms in constitution. The new electoral law on competitive elections adopted in 1983 was another major movement in the direction of liberalization (Agh, 1995: 299). Despite these changes, the communist party retained its unchallenged leading role.

By mid 1980's, however, the economic policies of Kadar came under strong criticism. On the one hand, a reform wing, which was led by Pozsgay developed within the party itself. On the other hand, several independent groups started coming into existence. By October 1987, the first opposition group, the Hungarian Democratic Forum (HDF) had its organizational convention. Among a plethora of social movements that developed in Hungary by late 80's, those who had political inclinations emerged as protopolitical parties like the Federation of Young Democrats and the Network of Free initiatives. Moreover, there was a sort of mutual support between the party moderates and emerging groups, which strengthened them both. Pozsgay, for example participated in the organizational meeting of HDF (Linz and Stephan, 1996: 302).

The new law on associations passed by the parliament in early 1989 was followed by the emergence of three political organizations. Hence, a de facto multi

party political system came into being within the framework of the one party system in Hungary. This limited pluralism brought about significant consequences. Once the process had started neither the government nor the parliament could control the course of events. Agh argues that during the 1988-1989 period the opposition was able to block the adoption of a new constitutional draft prepared by the government on the basis that no institution was legitimate enough to adopt a new constitution (1995: 301).

2.5.2 RTT and the September Pact

What imparted the Hungarian transition with its negotiated pact characteristics, therefore, is the existence of both a political opposition and moderate reformers within the regime, who had the capacity to negotiate. Moreover, both parties had all the reasons to find common solutions given the uncertainty of situation and fear for their future. As Linz and Stephan put it, negotiation became the preferred possibility for both moderate players because both sides knew they could not triumph by their own efforts alone, both recognized the depth of the social and economic crises and both feared what a repeat of 1956 would do to their future” (Linz and Stephan, 1996: 306).

By mid 1989, the regime forces decided to enter negotiations with the opposition. RTT were held between 13 June and 18 September. Differently from the case of Bulgaria, the opposition showed signs of maturity and strength by refusing to negotiate separately, and by creating first the opposition’s own round table. The main decision in the oppositions’ roundtable was that their purpose would not be to share power but to arrive at free elections (Linz and Stephan, 1996: 307). Consequently, the parties to the negotiations were regime reformers and a unified opposition movement.

The main thrust of the agreement was the creation of multi party constitutional democracy. The contentious issues evolved around electoral procedure and presidential elections and powers. Concerning the electoral system, quite similar to the Bulgarian case, the communists opted for majoritarian elections, while the opposition forces supported proportional system. The agreement was a middle way encompassing both majoritarian and proportional elements.

With regard to the presidency the contending issues were the timing and the powers of the president. Communists, on the assumption that no one could match the popularity of their candidate, Potzsguy preferred a direct election before the Assembly was elected. The opposition asked that the presidential election take place after the general elections and opted for limited presidential powers. The agreement was a concession to communists demands, but it did not materialize because parts of the opposition were able to initiate a referendum, which decided that the president be elected after the parliament. Thus, the final result was different from the roundtable agreement and the presidency went to a politician from the opposition, elected by the new parliament (Elster, Offe and Preuss, 1998: 67). In addition, the parties agreed upon the establishment of a strong parliament and Constitutional court.

A major difference between Hungary and Bulgaria is that unlike Bulgaria where constitutional choices were left to the new parliament, in Hungary the RTT turned into a quasi-constitutional assembly (Szikinger, 2001: 410). In the course of creating a framework for transition the discussion of constitutional amendments prevailed over other issues. The agreement reached in RTT was crystallized in the form of constitutional amendments when the parliament sanctioned it without any substantial changes.

In this respect, the new amendments were a quick fix solution reached in a period inclined to consensus. According to Elster constitution-makers “exploited a window of opportunity –a short period during which the communists remained demoralized and the opposition was not yet seriously divided” (Elster, 1993: 167-217).

However, the 1989 constitution was intended to be an interim framework to promote change. As Agh argues, its transitory character can be found in two main solutions. First, the predominant role of the parliament in passing most of laws with a qualified majority, which means in fact the establishment of a constitutional assembly for managing the political transition, and second going beyond Hungarian constitutional transitions with respect to the rights of the president, investing him with the role of safeguarding democracy (1995: 304).

2.5.3 Dubious Legitimacy and a Prolonged Interim Solution

The 1989 interim constitutional settlement proved to be an important milestone in the transition process by setting the basis of a peaceful and negotiated democratic transition. It was also agreed upon in the RTT encompassing a broad spectrum of the Hungarian political forces, which has imparted it with some degree of legitimacy.

But, the legitimacy of its making as well as its capacity to meet the challenges of democratization has not gone unchallenged. First, the 1989 constitution has remained a source of political conflict because of the legitimacy problem associating the moment of its genesis. Being the product of elite negotiations in amending the communist constitution of 1949 and sanctioned by a non-elected parliament the Hungarian constitution lacks the legitimacy associated with an elected constituent assembly or popular endorsement by referendum. In the words of Szikinger, “the present day

constitution is a result of bargain between the old and new elite. [] The fact that the subject of the constitution is narrowed down causes damage to the credibility and acceptance of the constitution” (2001: 414). Thus it seems to miss the necessary chain of consensus that links democratic politics with the society.

Moreover, the 1989 constitution, which turned to be permanent, embodies all the problems of a transitory constitution that was intended to manage the rapid political and economic change for a short period of transition. The flexibility the constitution is purposely blessed with, has led to a situation where interpretation and necessary constitutional modifications can be made without enormous difficulty. The best examples of disregard for constitutionalised structures are the 11 amendments of the constitution since 1989 (Szikinger, 2001: 414). Thus, the constitution remains a tool of a small elite and can easily fall prey to actors’ self-interest. It still is the case that “partisan interests dominate parliamentary debates in Hungary excluding any chance for outside actors to have a significant impact on decision-making” (Szikinger, 2001: 418).

2.6 Conclusions

Both our case studies reinforce the argument that the mode of extrication, the concerns of the political authors involved in the process and the institutional settlements at the beginning of transition are the main factors to influence constitution- making. In Hungary, the negotiated pact transition, the powerful opposition and the round table agreements shaped the constitutional process and the choices embedded in the constitutional amendments of 1989. Controlled transition and the dominant power of communist reformers in Bulgaria, can also explain some of the conundrums inherent in the Bulgarian brand new constitution. The round table negotiations taking place in both

countries at the beginning of the transition, were the one to decide upon the fundamental macro choices, in which meso and micro choices left to constitution-makers had to fit in.

However, both cases do also illustrate the case that institutions, hence constitutional settlements, can escape the interests of their framers. The provisions on a strong presidency or majoritarian electoral systems, pushed for by communist negotiators in both round table talks, were not adopted exactly as they were agreed upon.

Aspects of the constitution-making process like the timing, the body of framers and the way of adoption, on the other hand, seem to have limited explanation power in terms of democratization in Eastern Europe. The fact that Hungary has not yet adopted a new constitution has not hampered the process of democratization comparing with Bulgaria, whose new constitution was among the first to be adopted in all Eastern Europe. At the same time, although Hungary's constitutional amendments were agreed upon by the RTT and were passed by a non-elected parliament, democracy in Hungary does not fare worst than in Bulgaria, whose constitution was drafted by a freely elected constitutive assembly. Aspects of constitution-making process, as such, can hardly be associated with definite democratization attributes. Both cases illustrate that there is not an optimal constitution-making process in term of its democratic credentials, thus showing the limits of institutional engineering.

This is not to say, however, that the constitution-making process does not matter. My findings are limited to Eastern Europe, whose post-communist political condition creates a rather unique environment. Aspects of constitution-making may have more

significance in other political environments. Consequently, the study of constitution-making process should be case sensitive.

Although Eastern Europe experience does not provide enough evidence to define an optimal constitution-making process it shows the advantages of quickly adopting the main rules of the political game. Be it interim or permanent, new constitutional settlements influence the democratization process to the extent they provide the rules for the peaceful and democratic transfer of power, create a general framework of rules, which if do not channel the behavior of the political actors provide a space of discourse and rules the political actors continuously refer to. Thus, in spite of its share of problems associated with hastily agreeing upon the fundamental rules of the polity, both Hungary and Bulgaria constitutionalised the main achievements of the peaceful democratic revolution and profited from the existence of a general set of rules in several ways.

CHAPTER III:

THE IMPACT OF CONSTITUTIONS' EFFECTIVENESS ON DEMOCRATISATION

3.1 Introduction

The second chapter shows that constitutions' impact on democratization is not straightforward. Constitution-making is an intermediate variable, which may foster or inhibit democratization. This chapter intends to consolidate the argument that the correlation between constitutions and democratization is complex, by introducing another intermediate variable, which effects democratization: constitutions' performance. Thus, the specific question of this chapter is whether the effectiveness of constitutions accounts for different records of democratic progress. My hypothetical answer is that democratic attributes of constitutions are contingent upon their effectiveness.

Many studies of democratization maintain that the design of constitutions is important on the assumption that the constitutional frameworks create the main institutional incentives of the political system. In reality, however, the correlation between constitutional choices and democratization seem to be a matter of degree rather than a definite equation. The question on the optimal constitutional design is an open ended question because of two reasons: First, the constitutional text may embody UN-democratic provisions; Second, the constitution can be poorly implemented because they are a tool among many for democratic builders to use with greater or lesser skills.

Both the legal quality of the constitutional texts and their application in reality serve to operationalize the concept of constitutional effectiveness.

The first part of this chapter helps us define the two levels of studying constitutional effectiveness: legal texts and the implementation process. The second part, is an effort to define effectiveness and its indicators. The third part consists in the textual analysis of constitutions, with reference to human rights and the principle of check and balances. It addresses the optimal design question: is there any choice that automatically leads to democratization? The fourth part is concerned with the question of limits to institutional engineering by pointing to the gap between constitutional provisions on paper and in reality. I make use of the survey data collected from New European Barometer during 2001, to evaluate the performance of constitutions as they are experienced in their constituents daily life.

My findings suggest that although there are minor problems with constitutional provisions, they have imparted their regimes with the fundamental characteristics of democratic regimes. However, the lack of the rule of law in the governing process seems to be a major obstacle to democratization. Thus, constitutional provisions can hardly attributed a definite role in engineering their democratic systems.

3.2 The impact of Constitutions in Terms of Effectiveness

3.2.1 Effectiveness as a Variable Legitimizing the New Democratic Systems

People in post-communist countries have a long experience with regimes different from democracy. Therefore, there is a shortage of political culture associated with democracy. Moreover, the post-communist transition, which was initiated and

undertaken mainly from non-elected previous regime elites or opposition seem to carry dubious legitimacy. In this context, support for democracy is shaky and dependent on the performance of the new regimes, and the constitutions that set up their main characteristics. Thus, success of the new constitutions is very important in establishing the overall legitimacy of the new political systems.

Efficient democratic constitutions foster legitimacy by promising people what they want their political entity to have, and by putting into place firm rules for political conduct, which are rightly observed. Hence, efficiency is one of the main chains connecting new constitutions to democratization.

3.2.2 Two Levels of Evaluating Constitutional Effectiveness

Many studies of post-communist transitions focus on the impact of new constitutional settlements on the democratization process. Most of them implicitly refer to the performance of the constitutional choices, but there are very few works, which make effectiveness the central argument of their studies. Moreover, there is little consensus on the criteria employed to determine constitutional effectiveness. Seemingly, the definition and determination of constitutional effectiveness is neither easy, nor straightforward.

The body of literature, which builds on analyzing constitutional success, can be divided into three main streams. On the one hand, there are those studies, which engage in the textual analysis of constitutions. On the other hand, many studies seek to argue that the implementation of the constitutional design, rather than the design itself, is the key aspect of democratization. The intermediate position maintains that constitutional texts are and are not relevant. Constitutional norms are important because they define

the founding principles of the regime and mechanisms to protect the constitutional promises. However, it makes a difference whether legal devices are or are not observed in reality. The way legal norms are obeyed to by political authorities, has its own share in explaining the effectiveness of the set norms.

On the assumption that certain constitutional provisions produce certain political results, Elster, Offe and Preuss analyze the legal quality of constitutional texts with reference to human rights, structure of government, constitutional courts, amendment rules and electoral laws (1998: 81). Stephan and Skach study the consequences of a narrower ,but extensively studied issue of institutional design: parliamentarism versus presidentialism, which consist in different structural arrangements for the separation and balance of governmental branches (1993). They bring quantitative evidence, based on cross-national and time-series data, to illustrate their argument that there is a much stronger correlation between democratic consolidation and pure parliamentarism. Their strong support for parliamentarism lies in its tendencies like:

greater propensities for governments to have majorities to implement their programs; its greater ability to rule in a multiparty setting; its lower propensity for executives to rule at the edge of constitution and its greater facility at removing a chief executive who does so, its lower susceptibility to military coups; and its greater tendency to provide long party government careers, which add loyalty and experience to political society (Stephan and Skach, 1993: 22).

The works of Elster, Offe and Preuss and Stephan and Skach suggest that success of constitutions depend on the extent to which constitutions embody the right institutional choices.

Elgie and Zielonska, in the same vein, seek to answer the fundamental question on whether certain constitutional products guarantee better prospects for democratic consolidation (2001: 25-48). They put forward the argument that different types of

constitutional products, deliberately chosen by constitutional framers, have implications for the political system. However, the data set from post-communist institutional choices proves to be inconclusive to the extent they claim that “we are not close to the hyper rational ideal for designing institutions.... The transferability of set constitutional rules collides with the particularistic political cultures.” (Elgie and Zielonska, 2001: 45). Their work praises the work on institutional choices, but also introduces the idea of limits to institutional engineering. Mere texts can not be attributed a conclusive explanatory power of the democratization process. Consequently, constitutional performance should transcend the study of right provisions.

Evans and Whitefield conform to the intermediate position among design and implementation by studying both institutional structures and the operation of these structures as assessed by the constituents of the political system. According to them, the set of institutional structures in itself does not build up democracy. Institutional structures assist or inhibit democratization to the extent they determine people’s experiences with democracy. The institutional factors, which explain democratic commitment are: the degree to which constitutional arrangements were in place, the level of institutional conflict between branches of government, the development of the party systems and the outcome of the elections (Evans and Whitefield: 495). The main indicator of effectiveness is people’s evaluations. Thus, Evans and Whitefield’s parameters to measure effectiveness are people’s evaluations on the way their institutions work.

The gap between constitutional promises and the reality is also Davenports dual concern in studying political and civil rights. His conclusions remain somewhere in between the opposing views that constitutions provide the guiding principles of

government, on the one hand, and that they look good but they do nothing, on the other hand. Davenport brings statistical evidence to support his argument that constitutions provide some insights into how governments will behave. He proposes to “read” national constitutions in two manners: identify rights that are explicitly mentioned and the limits put in each” (1996: 645). His findings based on a large pool of cross-national and time- series comparison suggest that “a regime that has made a constitutional promise is more likely to stay to that commitment” (1996: 648).

The works of Elgie and Zielonska, Evans and Whitefield and Davenport points to the problem that constitutional provisions are relevant for democratization, but while put into practice, they are subject to interpretation. Thus, their studies bridge the studies built on the assumption of institutional engineering with the ones emphasizing the way the constitutional design is implemented.

The opposite view of institutional engineering maintains that legal norms may look good, but may also do nothing. To put it in a Russian saying “the law is like a door in the middle of the field. You can go through it if you want, but you do not have to” (Rose, 1997: 92-112). Thus, the implementation rather than constitutional design itself is the key aspect of democratic consolidation.

Defining democracy as the rule of law, free elections and enjoyment of political rights and liberties, Rose argues that merely holding free elections will not lead post-communist countries towards democratization (Rose, 1997: 94). For him, the greatest obstacle to democracy is the absence of the rule of law, as shown by the prevailing phenomena of exploitation of public office for private profits. In Rose’s own words, “today, corruption is the main cause of departures from the rule of law. The problems of minorities or emigrants are real, but they affect only limited groups in the population.

By contrast, corruption affects most citizens” (Rose, 1997: 1001). Based on problems such as corruption, which extends beyond law provisions to the way they are manipulated in the hands of political elites, Rose seems to be able to argue that democratization is a function of the way laws are implemented rather than dependent on good democratic laws. His analysis is relevant to the extent that he argues constitutional frameworks fell short of explaining politics of post-communist Europe, but he pushes it too far while excluding the ability of constitutions to shape the level of discourse and the institutional mechanisms actors cannot totally and always bypass. An important element of Rose’s work, however, is making use of mass evaluations on political transformations their countries are undergoing.

Most of the literature, which focuses on implementation as a determinant or one among other factors, employs survey data as a methodological tool to measure the success of constitutions in terms of democratization. The work of Rose, for example, is extensively based on the New Europe Barometer Surveys from 16 post-communist countries. In the same vein, Evans and Whitefield, although operating in the intersection of institutional and the implementation level of analysis, consider the individuals experience with their democratic institutions to be the main indicator of institutional effectiveness.

To sum up, studies on the impact of constitutional frameworks suggest that effectiveness can be perceived in two different levels, which especially as the intermediate approaches hold are necessary to grasp and determine effectiveness. Both legal devices set up in constitutional texts and the way constitutional settlements are put into practice are important to determine effectiveness.

Before going into the analysis of constitutions, let us first explicitly define what effectiveness refers to and the indicators of its effectiveness in each level.

3.3 Defining Effectiveness

Given the non-consensual use in different studies, both the definition of effectiveness and its determination are more difficult than it seems. An obstacle to defining constitution's effectiveness seems to be the distinction and at the same time the overlapping, between a political system compounded of regime and authorities and the constitution. However, because the implementation of constitutional rules is indivisible from the political authorities, the effectiveness of the system equals that of constitution at the level of implementation. As both Rose and Davenport suggest, the main indicator of the effectiveness, at this level, are people's negative or positive experiences with the institutions (see Davenport, 1996, Rose, 1997). Thus, data collected from survey research on people's evaluation of their system is the main source of measuring effectiveness of constitutions in the implementation level.⁸

The effectiveness of constitutional design, on the other hand seems to be easier to define but difficult to measure. Effectiveness of constitutional documents refers to the degree the constitutional provisions do not collide with each other and the degree they create mechanisms to protect, maintain and enable the principles they keep sacred. In this level of analysis, people's evaluations cannot tell much because they only indirectly experience the constitutional rules. Elster, Offe and Preuss, Evans and Whitefield and many other works suggest that the liberal constitutions tradition as well as political scientist research on institutional choices provides certain guidelines, if not

⁸ I will make use of survey data collected from New European Barometer

standards, to evaluate probabilities for constitutional success. Most of them consider human rights and the separation and balance of powers to be the fundamental choices that determine the nature of political unit. Therefore the main criteria to evaluate effectiveness in the textual level are the embodiment of certain choices and the lack of contradictions between different principles.

3.4 Analysis of the Constitutional Design

A whole generation of political scientists has struggled with the question of optimal constitutional design. Do certain provisions guarantee better prospects for democratization? If yes, which ones?

Although the constitutional design has been an over studied subject, it seems that political science is far from offering one model, which entails the best choice or choices. The debate evolving around the implications of certain choices for the nature of the political entity is inconclusive. In addition to the lack of agreement on the consequences of certain choices, there is little agreement even on the constitutional provisions, which impart the political system with its essential characteristics.

The constitutional framers face many bewildering choices. They must decide whether or not to include a charter of rights; they must chose what is the most appropriate balance and separation of powers among the executive, legislative and judicial branches of government; they must distribute responsibilities among the units of government; they need to select the most fitting electoral system and make many other choices.

Different authors focus on different sets of choices⁹. Schmitter and Karl provide the most comprehensive list of 11 important dimensions that provide a matrix of potential combinations by which political systems can be differently democratic.¹⁰ In their words “no single set of institutions, practices or values embody democracy” (Schmitter and Karl, 1991: 81-82).

However, some elements of constitutions seem to account more for the particular character of the polity. First, human rights are an indispensable element of democracy and the liberal constitutional tradition. The scope and character of human rights seem to determine the nature of the political regime. Second, structural arrangement involving the separation and balance of powers among the three branches of government is another essential choice that confronts architects of democratic constitutions. What are the advantages of each, and how does it work in the case of Hungary and Bulgaria?

3.4.1 The Scope of Human Rights and The Mechanisms Set to Protect Them

Today, almost every constitution contains a bill of rights entrenching civil and political as well as social and economic rights. Bills of rights have long been part of liberal constitutions. In line with the best of Western tradition and nowadays trends to enlarge the scope of human rights both Bulgaria and Hungary’s constitution contain an extensive catalogue of rights. Both constitutions have also introduced different mechanisms to enforce their provisions on human rights.

⁹ Elster, Offe and Preuss, 1998, define 5 different fundamental choices. Evans and Whitefield analyze 4 influential institutional choices. Liphart, 1993, articulates two essential issues.

¹⁰ The components, which create different democratic systems are consensus, participation, access, responsiveness, majority rule, parliamentary sovereignty, party government, pluralism, federalism, presidentialism and check and balances of powers.

Both constitutions embody a broad array of civil rights like the rights to life, freedom from torture, the right to privacy, freedom of thought, conscience and religion, and the right to property. The constitutions do also guarantee the traditional political rights like the right to vote, to elect and to be elected, the freedom of expression, and the right to assemble among many others. Thus, both the Hungarian and Bulgarian constitutions impart their democratic regimes with a very rich pool of rights and meet most of the international standards.

The rights and freedoms embedded in these constitutions seem to have a positive evaluation from an absolute majority of the people who experience them in their daily life. The opinion of Bulgarian and Hungarian citizens conforms to the overall regional trend of people's high esteem for their newly gained freedoms, as expressed by a regional average of 79% of respondents who believe they are freer now than in the old regime (New European Barometer, 2001).

However, neither Bulgaria nor Hungary is free of problems. Minority rights, for example, seem to be a problem in Bulgaria. Mainly directed against its Turkish minorities, the Bulgarian constitution prohibits the formation of parties along ethnic, racial or religious lines (Bulgarian Constitution, Art. 11.4, para, 3). Thus, the constitution is a source of limiting the representation of ethnic and religious minorities by restricting their right to form political parties. The problems with minority rights extend further to their right of education. Although the constitution stipulates the right of minorities to study their own language, the qualifications added to this right actually restrict the right of minorities to study in their own language because minorities are allowed to study their language as a subject not to use it as a studying language.(Elster and Holmes, 1992).

In addition to adopting an extensive bill of rights, both constitutions have created different mechanisms to protect the rights they envisage. One of the mechanisms both constitutions have opted for is the creation of the constitutional court. In each case the court is empowered with the right of constitutional review, which aims to control the conformity of laws with the constitutional norms. The Hungarian constitutional court, however, has been invested with more powers compared to the Bulgarian one. According to the Hungarian constitution, for example, citizens can appeal to the constitutional court alongside the political institutions, while the Bulgarian constitution does not provide its citizens with the same right. Moreover, according to the Hungarian constitution, the court can initiate the review procedure by itself (Elster, Offe and Preuss, 1998: 102-105).

Another institution, which provides an extra guarantee for the protection of human rights, is the ombudsmen. He is given the role of representative of the people. Hungary's constitution establishes two ombudsmen, one for the protection of rights of citizens, generally, and one for the protection of the rights of minorities in particular (Hungarian Constitution, Art. 32). This dual structure can be a good example to follow for Bulgaria, which has considerable minorities and seemingly unresolved problems with their group rights.

A problem both constitutions share, however, is their tendency to overstep the boundaries of negative rights.¹¹ Elster Offe and Preuss criticize the trans-liberal character and the extension of negative rights with a positive and protective dimension, on the bases that these constitutions have politicized the concept of rights (1998: 83).

¹¹ Negative rights like the right to life, to property etc protect the individual against the state interference and are legally enforceable. Positive rights, on the other hand, are regarded as policy goals whose realization is contingent upon the political process.

The Bulgarian constitution, for example, in addition to articulating the right to life charges the state with “protecting human life and punishing any attempt upon human life” (Art. 4, para. 2). The same trend of politicizing rights is found in the Hungarian constitution, where the provisions about property rights, for example, are included in the chapter containing general provisions, instead of the chapter on fundamental rights and duties.

Another problematic trend, reflected in both the Hungarian and Bulgarian constitutions, is the broad scope of positive rights, which they encompass. Both constitutions contain, among many others, the right to work, to unemployment benefits, to education, to healthy working conditions or even so called third generation rights like the right to a healthy and favorable environment (Elster, Offe and Preuss: 1998: 86). Generally lacking mechanisms for their implementation, constitutions add to the ambiguity and administrative discharge of their respective obligations. As Ganev puts it for the case of Bulgaria, “social-economic rights seem to be daily irrelevant in Bulgaria. They do not impose a burden on politicians, who easily disregard them” (2001: 198). Moreover, positive rights involve government interference, thus shift the authority of implementation from courts to the executive.

3.4.2 The Regulation of Relations between State Agencies.

The regulation of relations among the branches of government stands for the separation of powers among the executive, legislative and judiciary, which has long been an important principle of the liberal constitutional tradition. It is complemented by

the principles of check and balances, which, maintains to create a functional, fair and responsive political system. The American constitution of 1789 provides a typical example.

Two well-known models of executive-legislative relations are presidential and parliamentary systems. Stephan and Skatch argue that democratic regimes actually face a narrow choice that stands somewhere in between these two systems (1993: 2). Each of the choices consists in a different matrix of the separation of powers. The distinguishing feature of parliamentary systems is that the executive is elected by and is responsible to the legislative, which tends to produce a system of mutual dependence among them. In presidential systems, by contrast, the executive and the legislative are elected separately and have fixed terms in office, which reinforces separation, or to put it differently mutual independence, between the different state agencies (Stepan and Skatch, 1993: 3). In addition to the mode of election, the powers awarded to each branch constitute an important criterion of distinguishing between the two systems. The different combinations of the mode of election and the powers embedded in each branch, create a great deal of diversity among the intermediate models, which combine features of both models (Liphard, 1992: 3).

The choice between parliamentary and presidential systems has been one of the most fiercely debated issues in political science. Linz has forcefully advanced the virtues of parliamentary in contrast to the perils of presidential systems. Among the most important advantages of parliamentarism are: greater propensities to resolve political crisis, which presidential systems suffer from; greater possibilities for representation versus presidential systems, where there is only one prize at stake and the

winner takes it; lack of the dual legitimacy problem, which occurs in the presidential systems where both the parliament and president claim legitimacy on the basis of their popular election (see Linz, 1990; Stephan and Skatch, 1993; Liphard, 1991).

Both, Hungary and Bulgaria adopted parliamentary systems, yet their conception of parliamentarism differs considerably. How do their systems work? Were any of the formulas associated with better performance?

3.4.2.1 Overparliamentarism in Hungary

The Hungarian constitution displays a clear preference for parliamentarism. In contrast with other post-communist constitutions, which refrain from using hierarchical qualifications, Hungary relegates popular sovereignty only to the parliament by stipulating that “the national assembly is the supreme organ of state power and popular representation” (Hungarian Constitution, Art. 19, para. 1). In line with the inserted superiority of parliament versus other branches, the Hungarian parliament is given powers unmatched by its counterparts. The constitution inserts that the parliament “shall guarantee the constitutional order of society, and shall determine the structure, orientation and conditions of government” (Hungarian Constitution, Art. 19, para. 2). The parliament is also assigned the double role of both constituted and constituent power (Hungarian Constitution, Art. 19, para. 3). Moreover, the amendment rules, which require no other qualifications except of the approval by 2/3 of representatives, has led to a situation where parliament can modify the constitution without any difficulty.

Vesting too much power in the parliament has been one of the most criticized dimensions of constitutional reform in Hungary. First, easy amendment procedures

have blurred the separate function of ordinary legislation, constituent power and the power to amend the constitution. Second, Hungary's strong parliament ended up becoming an almost supra-constitutional body. As Szikinger argues, 11 modifications to constitution since 1989 reflect the fact that the parliament possesses constitutional authority (2001: 415). Agh refers to the Hungarian system as overparliamentarization (Szikinger, 2001: 418). This is not to say, however, that there are not any principles out of the reach of parliaments. And by most accounts, the parliament's power does not go unchecked to the extent it endangers the separation of powers principle.

Regarding the relation between the parliament and the executive, two criteria are important: the mode of electing the government and the powers she is invested with. The Hungarian case displays a preference for strong and stable government according to both criteria. First, although the Prime Minister is elected by the majority of parliament upon the instigation of president (Hungarian Constitution, Art. 33, para. 3), the other member of the cabinet are appointed by the president at the suggestion of the Prime Minister (Hungarian Constitution, Art. 33, para. 4). As such, the ministers are accountable to parliament, but they are not subject to the vote of no confidence. Moreover, the Prime Minister can only be removed by a constructive vote of no confidence, which requires that no confidence motion be paralleled with the nomination of a new Prime Minister. In this context, the Prime Minister has a strong position vis a vis the parliament, which somehow balances the separation of powers. The April 1990 amendments, especially curtailed the rights of the parliament by extending those of the government (Agh, 1995).

The power of the second element of the executive, the president, is more equivocal. He is elected by parliament, but he has been invested power not proportional

to the way of election. In addition to the normal powers of president to represent the unity of the nation, he shall also “safeguard the democratic functioning of the state organization” (Hungarian Constitution, Art. 29, para. 1). The power of the president entails contradictory elements and collides with parliaments power to “guarantee the constitutional order of society”. The unclear allocation of such an essential function is likely to cause political conflicts, which do not serve democracy well.

Other ambiguous powers of president are a broad range of emergency powers like the right to instigate legislation, to affect the convocation of the parliament and to initiate plebiscites, participation in determining foreign policy and important appointments (Elster, Offe and Preuss, 1998: 95-98). But, because the presidential powers are not that clear and often overlap with powers invested in other branches, they can hardly serve to balance the parliament or the governmental powers.

The role of the president seems to gain some significance, especially vis a vis the government, if one takes into account the decisions of the Hungarian Constitutional Court. The prime minister has asked the Court, several times, about the rights and duties of the president. Court’s decisions and interpretations of the presidential powers have served to clarify the institutional framework of the separation of powers, to a considerable extent. In a conflict that rose between the president and the prime minister on the election of the high directors of media , for example, the Court confirmed the rights and duties of president to safeguard the democratic workings of institutions (Agh, 1995: 310).

Thus, while the roles of parliament, president and prime minister are separated and balanced, they suffer from some ambiguities, in which the constitutional provisions

have the largest share. The Constitutional Court is more or less a separate case and its role seems to have been clearly specified.

The Constitutional court is not considered as part of the judiciary and it is regulated in a separate chapter, which ranks higher than the executive, but lower than the parliament. The court is also perceived to be beyond the power triangle, but influences their relationships in accordance with its duties to “contribute to the creation of state built on the rule of law, protect the constitutional order and safeguard the separation and balance of powers” (Agh, 1995: 315).

To sum up, the Hungarian constitution displays some defects of over parliamentarization and internal inconsistencies in the allocation of power among different branches. However, it has, by and large, established an organic relation between the branches of government, which is well served by an independent and active constitutional court.

3.4.2.2 Separation of Powers in the Bulgarian Constitution

The Bulgarian constitution, like the Hungarian one, has clearly opted for a parliamentary system. Along the similarities, the Bulgarian system displays many differences in comparison to the Hungarian case. First, although its supremacy is guaranteed in the provisions of the basic law, the Bulgarian parliament has to share the distinction of “representing the people” with the popularly elected president, which is one of the restrictions against the unlimited power of parliament.

Second, the parliament seems to have much more limited constitutional powers given the different amendment procedures, which are set in the constitution. For certain amendments, the election of a special convention of the parliament, whose powers

expire after it has performed its task, is necessary (Hungarian Constitution, Art. 157, para. 62). Other amendments require an equally burdensome procedure, which requires the approval by $\frac{3}{4}$ of all members of the assembly in three ballots on three different days (Hungarian Constitution, Art. 154, para. 1). These extreme versions of deliberation requirements tend to make amendments almost prohibitively difficult. Consequently, contrary to the many amendments the Hungarian constitution has been subject to, the Bulgarian one has resisted any attempt of change.

Third, The Bulgarian constitution has also opted for a strong government, but the prime minister is weaker than his Hungarian counterpart. The prime minister is elected by the parliament upon the designation of the president. He needs only a simple majority of the representatives, present in parliament, to be elected (Hungarian Constitution, Art. 84, para. 6). While it is relatively easy to become prime minister, it is difficult for him to be called by the parliament because the vote of no confidence requires the absolute majority of all the members of parliament (Hungarian Constitution, Art. 89, para. 1). Similar to the Hungarian choice, Bulgaria's prime minister is strengthened vis a vis parliament, by giving him the power to elect and dismiss the cabinet members, who are responsible to him (Hungarian Constitution, Art. 84, para. 6). Although the ministers are accountable to parliament they are not subject to parliament's vote of no confidence. As in Hungary, a vote of no confidence can be put into motion against the prime minister, but what weakens the position of the Bulgarian government is the lack of constructive element in the vote of no confidence.

Fourth, the Bulgarian Constitutional Court, similar to the Hungarian one, is given independence out of the power triangle. The court is dealt with out of the chapter of judicial power. It is also empowered with the right of constitutional review, which

serves to maintain the supremacy of constitution over the legislative, government and even people (Hungarian Constitution, Art. 149, para. 1). The main task is to maintain the principle of check and balances between the interested actors, which is reflected in the selection of the judges: 1/3 are elected by the parliament, 1/3 by the justices of the supreme courts and 1/3 by the president (Hungarian Constitution, Art. 147). The Bulgarian Court, however, falls short of the extended powers given to the Hungarian one. Most importantly, the individual citizens do not have access to the court, which has led Elster, Offe and Preuss to argue that the Bulgarian Court is “more a government tribunal with specific competencies in the sphere of government” (1998: 104).

Fifth, the popular election of the Bulgarian president is a feature of departure from the pure parliamentary system of Hungary, where the president is elected by the parliament. However, this mode of election has not created a presidential or even semi-presidential system because of the shortage of powers the president is invested with. Actually, as in the Hungarian case, there is ambiguity with regard to the presidential powers. While the Hungarian president is over empowered given his mode of election, the Bulgarian one is bestowed few powers comparing to his popular election. He has some competencies in designating the prime minister, but his right is subject to many additional qualifications. In case of political crisis he has to dissolve the parliament and appoint a caretaker government, being refused any discretion to resolve the crisis (Hungarian Constitution, Art. 99, para. 5). His major power vis a vis the parliament is his right to veto parliamentary bills. But, because the majority members can overrule the presidential veto it is essentially suspensive (Hungarian Constitution, Art. 101). The powers of president vis a vis government is equally weak, as most of his strategic appointments require the countersignature of the prime minister.

Thus, Bulgaria's regime displays a weaker parliament comparing to the Hungarian case. The supremacy of constitution is strongly put forth in the form of almost prohibitively difficult amendment procedures. One of the problems of the constitutional document lies in the discrepancy between the legitimacy of president deriving from the way of his popular election and relatively weak competencies and means to involve in politics. But, Bulgarian constitution has also succeeded in creating a system of check and balances among the three branches of government.

3.5 The Gap Between Constitutional Premises and Reality in the Process of Implementation

The analysis of both Hungarian and Bulgarian constitution texts suggest that, in spite of some ambiguities, they have, by and large, succeeded to adopt a rich catalogue of human rights and to curb political power. Legally speaking, both constitutions embody the best of the liberal constitutional tradition, thus imparting their regimes with the essential democratic credentials –human rights and a system of check and balances. The first level of constitutional performance, thus, enables us to conclude that both constitutions provide legal frames adequate to the necessary requirements of a democratic polity. But, were the democratic credentials of those legal texts translated in a democratic system? Did the 'good' institutional design work 'good' in practice? In short, does the reality conform to constitutional provisions?

While constitutions, in both countries under study, provided promising rules in terms of democratization we should still evaluate their implementation. Because democratization is a social project in addition to an institutional one, the people who experience them can best evaluate the performance of rules in reality. Moreover,

people's evaluations have a stronger propensity to truth because they bypass institutions' or political actors' interest to show that they are doing well

In nowadays political systems people experience the performance of democratic institutions in a multiplicity of ways, which does not necessarily generate homogenous evaluations. People may experience differently, hence evaluate differently the extent to which authorities respect their human rights promised in constitution, the extent to which the government represents its constituents, the extent to which they can influence the government, the extent to which their officials operate within the democratic rules etc. Because of the limited scope of this paper I will focus on two indicators: Trust to particular institutions and the extent to which public officials operate within the rule of law. I will use the New European Barometer data collected by interviewing large representative samples of citizens across all post communist countries.¹²

3.5.1 Trust in Parliaments and Courts

As argued in the second part, both Hungarian and Bulgarian constitutions have opted for parliamentary systems, where the parliament is the central organ of the democratic polity. In both countries parliaments have legislative functions, control governments through the election of the prime minister and the vote of no confidence, and perform other essential functions. Moreover, they are the main representative body directly elected by people, thus standing for the main democratic achievements of the post-communist transformations.

¹² Centre for the study of public policy New Europe Barometer, 2001
http://www.cspp.strath.ac.uk/index.html?catalog20_0.html

26% of the Bulgarians, trust more to the parliament than to other institutions like parties, courts and police. In Hungary, only 16% trust more to the parliament than to the other institutions (New European Barometer, table 3). Low support for parliament, in Hungary, may be explained with some observers' critiques towards the overparliamentarisation process, which can be traced in the easy amendment procedures; exclusion of interest groups from the decision-making process; exclusion of small parties from parliamentary representation; and domination of partisan debates (Szikinger, 2001: 414-417). In the Hungarian case people's evaluations conform to constitutionalists critical position on the very strong parliament's impact in the Hungarian political life.

Both constitutions have also established constitutional courts, whose major function is safeguarding the constitutional principles through constitutional review. In a comparative basis, however, the Hungarian court seem to have a superior position with regard to its independence from the power triangle, the broad range of functions, and the active position the court has taken on many political issues. More importantly, the right of citizens to appeal to the court seems to have raised its credibility as expressed by 36% of the respondents who support parliament more than any other institution.

The Bulgarian court is also guaranteed independence from other branches of state and has adopted an active role in politics. Especially the refusal of the court to declare unconstitutional the party of ethnic Turks is seen as a prove of Courts independence and political maturity (Ganev, 2002: 199-200). However, the weaker position of the Bulgarian court comparing to the Hungarian one, may explain why only 24% of Bulgarians trust their court comparing to 36% of Hungarians that do so (New European Barometer, table 3).

People's evaluations on the performance of both parliaments and courts, in the form of trust in these constitutions, reflect the impact the constitutional provisions have on political life. People's evaluations on their parliament and courts, in both our cases, conform to the hypothetical relation between parliamentary systems and democratization. The choice to strengthen parliament vis a vis other institutions has been translated in an effective institution, which is trusted from the people.

3.5.2 Governing Without the Rule of Law

The gap between rules and their application seem to be more important when considering executive's performance. People across the region have low esteem for the honesty of their public officials, which is also reflected in the answers of the Hungarian and Bulgarian respondents. An absolute majority, 74% of the interviewed Bulgarians, think that most or almost all public officials take bribes or are corrupt in other forms. The percentage of Bulgarians is higher comparing to 54% of the Hungarians that believe their officials are corrupted (New European Barometer, table 1).

Ganev explains the paradoxical discrepancy between the successful installation of pre-fixed rules and vulnerability of Bulgaria's system to corruption, by inserting that institutional engineering is a multifaceted social project, which has not yet impacted the Bulgarian elites (2001: 208). Constitutional provisions, laws and institutions are constantly ignored given the extraordinary profit incentives that post-communist transition fosters. Opportunities to strike it rich during a period of chaotic privatization, license of private banks operating with state money and similar occasions, all concentrated in the hands of the elected officials, provide a context favorable to the

looting of state resources. In addition to the context the behavior of elites seem to be foreign to the ethics of good governing.

Thus, it seems that constitutional rules have little impact on the behavior of government officials, which is the main obstacle to democratization. In addition to free elections and political rights and liberties, consolidation of democracy requires a government that obeys laws and is not steeped in corruption. Creating incentives for good behavior and good governance, however, is beyond the influence of constitutions.

The poor performance of current regimes, in terms of the rule of law, inhibits popular support, thus undermining prospects for democratic consolidation. Survey data shows that Bulgarians, who are exposed to the most corrupted system, have lower support for their regime. Only 59% of Bulgarians, comparing to 76% of Hungarians support their current regime (New European Barometer, table 2).

The correlation between trust to their officials and support for the regime seem to extend to the correlation less corruption more support for the future regime. While, 59% of the Bulgarians support the current regime, a lower percentage of 58% are expected to support the future regime. Hungary, which displays smaller scale problems with corruption, shows more optimistic tendencies. 87% of the Hungarian respondents are expected to support the future regime, while 76% support the current one. (New European Barometer, table 2).

Thus, people's evaluations on the performance of rules in practice show that a good constitutional design does not have magical consequences. In spite of their democratic constitutions, both Hungary and Bulgaria are vulnerable to corruption and elite's looting behavior, which decreases support for the democratic regime and is likely

to do so in the future. Both our case studies point to the limited capacities of constitutions to effect the democratization process.

3.6 Conclusions

Both cases under study have opted for parliamentary systems, which are attached more democratic credentials comparing to the presidential systems. They have also adopted extensive bills of rights and have regulated the separation of the three branches of government according to the principle of check and balances. Although, these constitutions are not free of problems, they by and large have imparted their respective regimes with the main characteristics of democratic systems.

However, both cases show that there is a discrepancy between the constitutional provisions in letter and the reality of their application. Measured by the evaluation of people's experiences with their democratic institutions, constitutions proved to matter to the extent they have created strong parliaments and courts which are among the most trusted institutions in both Hungary and Bulgaria. Popular trust in their public officials, on the other hand, is quite low in both the countries, but extremely low in Bulgaria, where only 25% of the respondents believe their officials are not corrupt. Support for current as well as future regime, consequently, is much lower in Bulgaria than in Hungary. Thus, problems with corruption and looting of state resources remained out of the reach of constitutional rules. These problems undermine support of democracy inhibiting the process of democratic consolidation.

This chapter suggests that because democratization is a multifaceted social project constitutions matter but not always. Good constitutions do not necessarily translate in good policies. Therefore, in addition to 'good' constitutions, democracy

requires incentives for good governance. As long as post-communist countries fail to regulate the behavior of elites in accordance with the rule of law, the whole project of democratic consolidation remains an open ended question

3.7 Tables

Table 1 CORRUPTION AND BRIBE-TAKING SEEN AS WIDESPREAD

(% thinking most or almost all public officials take bribes, are corrupt)

Lithuania	95%
Latvia	92
Romania	89
Slovakia	80
Bulgaria	74
Poland	69
Czech Republic	66
Estonia	63
Hungary	54
Slovenia	42
(New Europe mean)	(73)

Source: Centre for the Study of Public Policy New Europe Barometer, 2001; New Russia Barometer, 2001.

Table 2 ATTITUDES TOWARD OLD AND NEW REGIMES AND THE FUTURE

	Old regime	Current system	Future
	(% positive)		
Czech Republic	31	76	83
Slovenia	64	75	73
Hungary	68	76	87
Estonia	61	69	81
Bulgaria	57	59	58
Latvia	63	53	74
Romania	55	50	62
Lithuania	55	46	54
Slovakia	61	39	49
(New Europe mean)	(58)	(61)	(68)

Table 3 TRUST IN POLITICAL INSTITUTIONS

	Parliament	Parties	Courts	Police
	(% trusting)			
Bulgaria	26	25	24	31
Czech Republic	20	21	34	40
Poland	20	8	15	21
Hungary	16	14	36	29
Romania	13	9	19	36
Slovenia	10	8	26	24
Estonia	10	8	26	30
Lithuania	9	8	16	19
Latvia	8	7	24	27
Slovakia	8	9	15	26
(New Europe mean)	(14)	(12)	(25)	(28)

Source: Centre for the Study of Public Policy New Europe Barometer (2001) and New Russia Barometer (2001). Trust: persons give institution a rating of 4 to 7 on a seven-point scale.

CONCLUSIONS

This study is an effort to analyze the impact of constitutions on democratization. In the theoretical part I look at why and how constitutions effect democratization, especially given the volatile socio-economic and political environments, characteristic of post-communist countries. The empirical study of constitution-making, constitutional design and its implementation, in the cases of both Bulgaria and Hungary, shows the limits of constitutions in engineering political systems.

This study suggests that, because democratization is a multifaceted project, constitutions by themselves can not produce a workable democracy. Constitutions did not bring a fundamental change in the way in which Eastern European societies were governed and did not induce respect for the rule of law among governing elites. However, constitutions did prove to be a crucial asset to democratization: they were indispensable in structuring the new governments and spelling out a catalogue of basic rights. Thus, certain processes and certain products guarantee better prospects for democratization, but they do not ensure a smooth democracy building process.

Certain constitutions are more amenable to this process than others. One of the consensual arguments of constitutionalists is that liberal constitutions share two main principles -the separation and balance of powers among the branches of government and a bill of fundamental rights, while providing mechanisms for the realization of those provisions in reality. Thus, democratic credentials of constitutions depend to the extent they encompass these principles and appropriate mechanisms to defend them.

Most students of democracy advocate constitutional restraints on the basis that it prevents both the majority and the passionate demos to overturn democratic principles and procedures embedded in constitution; it insures people's representatives do not betray their electorates; they provide the fundamental rules of the polity, which enable democracy. The transition processes seem to foster the need for constitutional constraints because of the difficulty of simultaneous economic, social and political transformations, the institutional vacuum, and the logic of transition. Given the uncertainty of transition, the impersonal, rational, legal, legitimate and unquestioned protection of democratic principles assist democratization because they provide the light at the end of the tunnel. Moreover, the post-communist transition is one of the rare constitutional moments, which carries the spirit of the democratic revolution, thus an opportunity that democratic aspirations become a permanent feature of Eastern Europe.

Consequently, 'good' constitutions can smooth the path of political process to democracy because it is not left to chance, reflection or choice. In addition to the ambitious claim of democracy, constitutions can induce a set of democratic friendly political trends, whose not exhaustive list would be stability, discretion, continuity, normality, possibility of redefinition of the rules, and virtue economizing. But, how does it work in practice? How are constitutions made? How good they are? And, how are they implemented?

Both Hungary and Bulgaria chose to freeze certain features of the new regimes in their new constitutions. The mode of extrication proved to be an important factor in the process of constitution-making to the extent that it determined the political actors and their negotiating power input in the process. The mature post- totalitarianist regime in Hungary dictated the option of negotiated transition, while early post-totalitarianism in

Bulgaria was translated in a controlled transition dominated by the former communist elite.

The RTT, which set up the macro choices of the new regimes, in which the meso and micro-choices left to constitution-makers had to fit in, were the most important transitory institutions to effect the constitution-making process. The Bulgarian RTT, organized and directed by the communist regime elites, created more space for the realization of their interests while the Hungarian RTT established more neutral provisions given the power and the united opposition, which contravened regime reformers. Both RTT, however, started the irreversible process of democratization by agreeing upon a peaceful, evolutive, legal, but progressive and determined transition; and negotiating the basic constitutional arrangements and the date of the first elections.

Aspects of the constitution making process in our case studies, can hardly be attached definite legitimizing roles because opposite choices did not produce very different consequences in terms of democratization. Bulgaria's choice to adopt a brand new constitution within 18 months has injected stability and predictability in the very volatile post-communist environment; has stimulated some democratic behavior and a minimum of respect for the rule of law among elites by institutionalizing incentives for their behavior; has specified and balanced the roles of each branch of government; and, has enhanced democratic inclusion in terms of accepting a broad array of individual and minority rights. Thus, by designing roles and practices, the Bulgarian constitution has provided a crucial scaffolding in support of the new evolving institutional practices. However, the constitution still bears the mark of hastily agreed upon provisions and arrangements. The Hungarian constitution, on the other hand, manifests a dubious legitimacy. The RTT simply amended the communist constitution and passed the

amendments within a non-elected parliament. Compared to the Bulgarian case where a special constitutive assembly was created with the purpose of drafting the new constitution, the Hungarian case is lacking in legitimacy. The Hungarian choice to adopt an interim constitution seem to have prolonged the constitution-making process indefinitely, but it proved to be a successful pliable framework to cope with the challenges of transition. And, it allowed time for long-term negotiations, which can help to establish a more stable document. Thus, our findings on the democratic credentials associated with certain processes of constitution-making are not conclusive, but it is certain that adopting new constitutions assisted democratization, because these constitutions provide people with a plethora of fundamental rights, have curbed political power through the separation and balance of powers, and have created institutional incentives for democratic practices.

But, are there any problems with the constitutional design? How ‘good’ are the constitutions in terms of providing mechanisms to ensure the realization of their principles and avoiding overlapping and contradictions among the constitutional provisions?

Both our case studies have encompassed a rich array of human rights and have imparted their regimes with mechanisms to protect them like the constitutional courts and the ombudsmen. A problematic trend concerning human rights provisions is the extension of the negative rights to positive rights, which involve government interference, thus shift the authority of implementation from courts to the executive. But, this has hardly effected the constitutional option to bless the new regimes with human rights that carry the best of the liberal constitutions’ tradition.

Concerning the separation and balance of powers, both our cases have adopted parliamentary systems, seen as more democratic compared to the presidential systems. The Hungarian case displays signs of overparliamentarisation and both cases include overlaps among the powers assigned to the parliament and executive, especially the president. But, by and large, both countries have opted for a system of separation and balance of powers.

The next issue, which intends to complete our argument on the complexity of the correlation between constitutions and democratization is the extent to which constitutional provisions are obeyed in reality. Measured through people's evaluations on the working of their institutions, constitutional provisions seem to have been effective in creating strong parliaments and courts, which are the most trusted institutions in both Hungary and Bulgaria. Popular trust in the executive and their officials, however, is quite low in both our cases but extremely low in Bulgaria, where problems with corruption and looting of state resources remain out of the constitutional principles' reach. Survey data shows that because of the lack of respect for the rule of law among the ruling elites, the gap between constitutional devices and their application is quite large. As one of the fundamental principles of democracy, failure or success to induce respect for the rule of law seems to be the main challenge of the future. And, good governing based on rule of law is out of constitutional range.

Thus, constitutions matter, but they have limited capacities in engineering their political systems. Certain processes and certain products guarantee better prospects for democratization, but they do not ensure a smooth democracy building process.

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